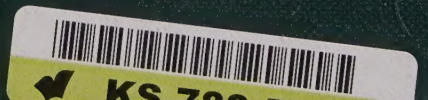

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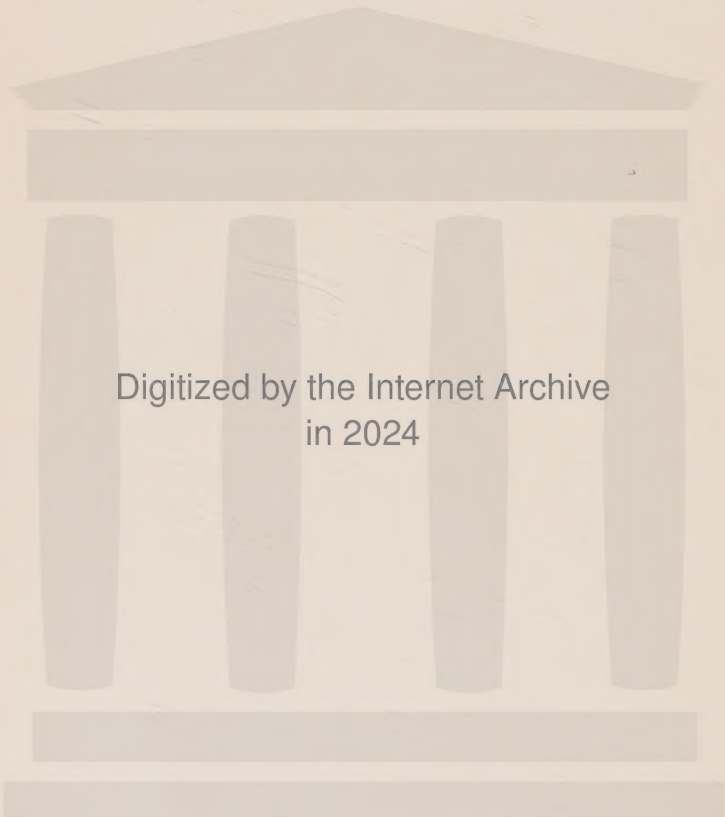

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THE LAW REPORTS

3–5 Exchequer Division

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THE

LAW REPORTS.

Exchequer Division.

REPORTED BY

JAMES M. MOORSOM AND ALEXANDER MORTIMER,
BARRISTERS-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,
BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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JUDGES

OF

THE EXCHEQUER DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLI VICTORIA.

The Right Hon. Sir FITZROY KELLY, Lord Chief Baron, President.
Sir ANTHONY CLEASBY, Knt.
Sir CHARLES EDWARD POLLOCK, Knt.
Sir JOHN WALTER HUDDLESTON, Knt.
Sir HENRY HAWKINS, Knt.

ATTORNEY GENERAL:

Sir JOHN HOLKER, Knt.

SOLICITOR GENERAL:

Sir HARDINGE STANLEY GIFFARD, Knt.

JUDGES

OF

THE COURT OF APPEAL.

XLI VICTORIA.

Lord Cairns, Lord Chancellor.

Sir Alexander James Edmund Cockburn, Bart., Lord Chief Justice of England.

Sir George Jessel, Master of the Rolls.

Lord Coleridge, Lord Chief Justice of the Common Pleas.

Sir Fitzroy Kelly, Lord Chief Baron of the Exchequer.

Sir William Milbourne James, Sir Richard Baggallay, Sir George Wilshere Bramwell, Sir William Baliol Brett, Sir Henry Cotton, The Honourable Alfred Henry Thesiger,	Ordinary Judges of Court of Appeal.

ERRATA.

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339	20 from top ..	.. ought not to be ..	.. ought to be.
143	8 from top ..	.. *Jackson* v. *Gilling*	.. *Jackson* v. *Gisling*.

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EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION.

XLI VICTORIA.

[IN THE COURT OF APPEAL.]

1877
Nov. 21.

FOSTER *v.* USHERWOOD.

County Court—Claim indorsed on Writ reduced below 50*l.* *by payment of Money into Court—Jurisdiction to make Order that Action be tried in County Court—*30 *&* 31 *Vict. c.* 142, *s.* 7.

Where a claim indorsed on a writ originally exceeds 50*l.*, and is reduced below that sum by a payment of money into court after action brought, a judge has no jurisdiction, under s. 7 of 30 & 31 Vict. c. 142, to order that the action be tried in a county court.

Osborne v. *Homburg* (1 Ex. D. 48) approved.

ACTION commenced by issuing a writ out of the district registry at Sheffield, dated the 3rd of October, 1877, and indorsed for a claim of 57*l.* On the 5th of October, after service of the writ, the defendant paid into court 19*l.*, thereby reducing the plaintiff's claim to a sum below 50*l.* On the 10th of October the defendant entered an appearance in the district registry, and on the 12th of October took out, under s. 7 of 30 & 31 Vict. c. 142 (1), a summons calling on the plaintiff to show cause why

(1) By 30 & 31 Vict. c. 142, s. 7: "Where in any action of contract brought or commenced in any of the superior Courts of Common Law, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it

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the action should not be tried in a county court. On that day, with the consent of both parties, the registrar made the order, but afterwards he refused to draw it up on the ground that he had no jurisdiction. The defendant then appealed to a judge at chambers, who refused to interfere, and on appeal the Exchequer Division affirmed the judge's decision, holding, on the authority of *Osborne* v. *Homburg* (1) that, where the plaintiff's claim is reduced below 50*l.* by payment into court after action brought, a judge, under s. 7 of 30 & 31 Vict. c. 142, has no jurisdiction to order the action to be tried in a county court.

The defendant appealed.

H. D. Greene, for the defendant. This case is distinguishable from *Osborne* v. *Homburg* (1), inasmuch as in that case the order was made against the wish of the plaintiff, whereas in this case the order is made by consent, both parties being willing that the action should be tried in the county court. The defendant by paying the money into court, and the parties by consenting to an order to try in the county court, have waived all objection, and given a jurisdiction to the county court.

[COTTON, L.J. The claim is not reduced within the meaning of sect. 7 by payment of money into court.

BRETT, L.J. Section 7 does not apply to cases of payment of money into court. The words are "reduced by payment, set off or otherwise." That must mean a payment, or set-off, before action.]

It is contended that the words "or otherwise" must be read as meaning payment or set-off after action. By s. 26 of 19 & 20 Vict. c. 108, a case may be remitted to a county court for trial after issue joined; in *Tomkins* v. *Beard* (2), by an order purporting

originally exceeded 50*l.*, is reduced by payment, an admitted set off, or otherwise, to a sum not exceeding 50*l.*, it shall be lawful for the defendant in the action within eight days from the day on which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in a county court, or one of the county courts in which the action might have been commenced: and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly. . . . ."

(1) 1 Ex. D. 48.

(2) 18 L. T. 363.

to be made under this statute, the case had been remitted to be tried in the county court before issue joined; but as the order had been made by consent, the Court of Common Pleas refused after verdict to entertain an application to set aside the proceedings. This shews that consent operates as a waiver of any irregularity in orders of this nature.

Forbes, for the plaintiff, was not called upon.

BRAMWELL, L.J. The appeal must be dismissed. The words of s. 7 are, "where the claim is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l*." Now it is quite clear that the words payment and set-off apply to payment and set-off before action brought, and the words "or otherwise" must likewise apply to something before action, and have no application to payment into court after the writ has been issued. When we look at the earlier Act, the words are, where the claim "is reduced by payment into court, payment, an admitted set-off or otherwise." There payment into court is mentioned, and the action is remitted after issue joined. It is urged that consent has waived the objection. I do not understand what is meant by waiving the objection. In this case the registrar had no jurisdiction to make the order to try the action in a county court. The parties cannot by consent confer a jurisdiction which does not exist. I agree with *Osborne* v. *Homburg*. (1) The case of *Tomkins* v. *Beard* (2) is different and does not govern this case.

BRETT, L.J. I am of opinion that *Osborne* v. *Homburg* (1) is rightly decided. In construing s. 7 of 30 & 31 Vict. c. 142, payment means payment before writ, set-off equally means something accruing before the action, and "or otherwise" must mean something happening before action which reduces the plaintiff's claim below 50*l*. If the reduction has not happened before action, the section does not allow an order to be made, and the defect cannot be removed by any lapse of time, for it is a question of jurisdiction. It is urged that the objection is taken away by consent, but consent will not confer jurisdiction. *Tomkins* v. *Beard* (2) is different. That was a case of faulty procedure: as the objection

(1) 1 Ex. D. 48. (2) 18 L. T. 363.

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FOSTER v. USHERWOOD.

was not taken before verdict the defect was cured. In the present case no jurisdiction existed to make the order, and the appeal must be dismissed.

COTTON, L.J., concurred.

Appeal dismissed.

Solicitor for plaintiff: *Maude.*
Solicitors for defendant: *Rickards & Walker.*

May 29. BAKER *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PORTSMOUTH ACTING AS URBAN SANITARY AUTHORITY.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 34—*Bye-law—Notice of Intention to Erect Buildings—Power to pull down Work done in contravention of Bye-laws.*

By the Local Government Act, 1858, s. 34, power is given to every local board to make bye-laws with respect to the level, width, and construction of new streets, the structure of walls of new buildings, the sufficiency of space about buildings, and the drainage of buildings, &c., and they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws:—

Held, that the power to make provision as to removing, altering, or pulling down buildings was not confined to work executed in contravention of bye-laws relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans.

DEMURRER to a statement of defence in an action against the defendants, as the urban sanitary authority of Portsmouth, for pulling down certain houses.

The statement of claim set out that the plaintiff was a builder and was lessee and occupier of certain land situate in the borough of Portsmouth. The statement of claim then proceeded to allege that, in July, 1875, plans were duly deposited with the defendants, in pursuance of a bye-law, for the construction of a street or road over this land, and were duly approved by the defendants. The plaintiff commenced to build sixteen houses on the land, but he did not before commencing them deposit plans thereof. The

defendants allowed the plaintiff to commence and to proceed with the erection of the houses without complaint or interference until November, and the houses were constructed in all respects in accordance with the bye-laws of the defendants relating to the construction of buildings. On the 22nd of November, 1875, the defendants charged the plaintiff before the magistrates with having built the houses without having first deposited the plans, in accordance with the bye-laws. The plaintiff thereupon pleaded guilty, and was ordered to pay a fine of 1*l.* and costs. In December, the defendants sent workmen and pulled down twelve of the houses, and, in doing so, used so much violence that the materials were rendered almost valueless.

In the statement of defence the defendants denied these allegations, except so far as the plaintiff admitted that he had not, before commencing the houses, deposited plans thereof. Certain bye-laws had been duly made by the defendants, under and by virtue of certain statutes. (1) By the third of such bye-laws it was provided that no building should be erected by the side of any new street, or to which any new street would form the only carriage approach, until such street has been constructed to the

(1) The Public Health Act, 1848, 11 & 12 Vict. c. 63; The Local Government Act, 1858, 21 & 22 Vict. c. 98; The Local Government Supplemental Act, 1864, No. 2. The 34th section of the Local Government Act, 1858, enacts that "every local board may make bye-laws with respect to the following matters (that is to say): (1.) With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof; (2.) with respect to the structure of walls of new buildings for securing stability and the prevention of fires; (3.) with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; (4.) with respect to the drainage of buildings, to water-closets, privies, ashpits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation: and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws: provided always, that no such bye-law shall affect any building erected before the date of the constitution of the district." This section is repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), but the provisions, with some additions, are re-enacted by the 157th section of that Act.

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approval of the local board. By the 32nd bye-law it was provided that every person who should intend to erect any new building should give twenty-one days' notice to the local board of such intention, such notice to be delivered to the local surveyor or left at his office, and should at the same time leave or cause to be left at the office detailed plans and sections and a block plan of such intended new building and its appurtenances, and a description of the materials of which the building is proposed to be constructed, of the intended mode of drainage, and water supply.

Bye-law 37 was as follows:—"The local board shall, by resolution or order, approve or disapprove of proposed new works or buildings within the times severally specified herein for the deposit of notices thereof; but if the owner or person intending to lay out any new street, or construct any new building, fail to give the notices herein required, or if any owner or person shall construct, or cause to be constructed, any works or buildings, or do any act, or omit to do any act, or comply with any requirement of the local board, contrary to the provisions of any or either of the hereinbefore contained bye-laws, he shall be liable for each offence to a penalty not exceeding five pounds, and he shall pay a further sum not exceeding forty shillings for each and every day during which any such works or buildings shall continue or remain contrary to the said provisions; and the local board may, if they shall think fit, at any time after the expiration of forty-eight hours from the time of the service of a notice in writing, addressed to such owner or person, signed by the local surveyor or the clerk to the local board, expressing their intention so to do, in default of such owner or person shewing good cause to the contrary in the meantime, cause any work begun or done in contravention of any or either of such bye-laws, to be removed, altered, or pulled down, as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by the Public Health Act, 1848; and any such notice may be served either personally or by leaving the same with some person either at the usual or last known place of abode or business of such owner or person, or at or upon the works or buildings referred to therein."

The statement of defence then alleged that the plaintiff erected the houses in contravention of bye-laws 3 and 32. The street was a new street, and the houses were erected before the street had been constructed according to the approval of the defendants. The plaintiff did not give the defendants such notice as by the 32nd bye-law was required to be given, and did not leave, or cause to be left, at the office of the authority for their use any detailed plans or sections, or any block plans of the houses, or any description of the materials of which the houses were proposed to be constructed, or of the intended mode of drainage or means of water supply. The defendants, afterwards, upon receiving a report from their surveyor, gave the plaintiff notice, in pursuance of bye-law 37, that they would, after the expiration of forty-eight hours from the time of the service of the said notice, in default of the plaintiff shewing good cause to the contrary, cause the houses to be pulled down, as having been erected by the plaintiff in contravention of the bye-laws. The plaintiff did not, within the forty-eight hours, or before the removal of the houses, shew good cause why they should not be pulled down, and the defendants accordingly, in pursuance of bye-law 37, and of their notice, and after the expiration of the forty-eight hours, caused the houses to be pulled down, as they lawfully might. The defendants denied that in so doing any unnecessary violence was used, or that the materials were rendered almost valueless, as alleged.

To this defence the plaintiff demurred.

The issues of fact were tried at the summer assizes, 1876, at Winchester, before Blackburn, J.

It was left to the jury to say if the ground on which the houses were built was in such a state when the buildings were begun as to make it improper to build dwellings on it without previous precautions. To this the answer of the jury was in the affirmative. Damages were assessed conditionally at 500*l.*, and the jury were asked if there was neglect of duty on the part of the defendants in pulling down the houses so as to put the plaintiff to unnecessary expense. This they answered in the affirmative, and assessed the damages at 18*l.*

It was reserved to the Court to enter judgment on the findings of the jury and the demurrer.

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A motion was subsequently made on behalf of the defendants for a new trial, on the ground that the finding of the jury on which they assessed the damages at 18*l.* was against the weight of evidence, and that and the other questions came on for argument.

Cole, Q.C., *Kingdon, Q.C.*, and *Petheram*, for the plaintiff. The Local Government Act, 1858, s. 34, authorizes the making of bye-laws with respect, inter alia, "to the level, width, and construction of new streets and the provisions for the sewerage thereof." This power refers only to the streets themselves, and not to the buildings by the side of the street or road, and consequently the 3rd bye-law is bad. The 37th bye-law is in excess of the power given by the statute, for the other matters in respect of which bye-laws may be made under s. 34 are all structural. By that section they may provide for the observance of these bye-laws by regulations as to notices and as to the power of pulling down. Where bye-laws as to structural matters are contravened they can be enforced by the provisions as to pulling down buildings, but there is no power to treat in the same manner transgressions of bye-laws as to notices to which other remedies are applicable. [They referred to *Brown* v. *Local Board of Health of Holyhead* (1); *Young* v. *Edwards* (2); *Hattersley* v. *Burr* (3); *Hall* v. *Nixon*. (4)]

Thesiger, Q.C., and *Charles, Q.C.*, for the defendants. The word "street" is applicable to the buildings which stand by the roadway, the whole together forming a street: *Pound* v. *Local Board of Plumstead*. (5) Then the local board may, under s. 34, make bye-laws with respect to certain matters, and in them they may insert provisions as to notices and deposit of plans. Such provisions would thus become part of the bye-laws, and the power to remove, alter, or pull down work done in contravention of the bye-laws, is as applicable to that part which relates to notices as to any other part.

Kingdon, Q.C., in reply.

POLLOCK, B. With regard to the new trial we will consult

(1) 32 L. J. (Ex.) 25.
(2) 33 L. J. (M.C.) 227.
(3) 4 H. & C. 523.
(4) Law Rep. 10 Q. B. 152.
(5) Law Rep. 7 Q. B. 183.

Lord Blackburn. The other, which is a more important and more general question, is raised both upon the evidence at the trial and upon the demurrer. Whether the verdict for 500*l.* should stand depends on the construction to be put on the statute under which these bye-laws were made, and upon the bye-laws themselves.

The bye-laws in question are made under the Local Government Act, 1858, and the power under which they have been made is contained in the different sub-sections of s. 34 of the Local Government Act, 1858, the first of which is in these words: "With respect to the level, width, and construction of new streets, and provisions for the sewerage thereof." Next: "With respect to the structure of walls of new buildings, for securing stability and the prevention of fires." 3rd: "With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings." Then with respect to drainage and other matters, such as water-closets, and so forth. Then comes this general provision: "And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws."

It is quite clear that the local authority, in making their bye-laws assumed two things. One is, that when they made their bye-laws with reference to the level, width, and construction of new streets, that did not merely mean they were limited to the mode in which a new road should be laid down, shewing the width of the road and the proper curve of the roadway, the paths on either side, the drains beneath, and matters of that kind. They clearly supposed they were entitled, when dealing with the words "new streets," to take the popular sense of the word "street," as meaning not only a roadway over which passengers and vehicles might pass, but also that which in popular language is part of the street, namely, the houses on both sides. It certainly seems to me that there is a great deal to be said for that construction, as

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a matter of ordinary experience and common sense; because otherwise, as was said in the course of the argument, a street might be limited to forty feet in width, and then the buildings which are on either side of that street might be such as to make it as regards proportion a worse street than the streets in London were before the Great Fire. That cannot be the intention of the Act, and as far as one can gather, it seems to me that they used those words properly when they used the words "new streets." There are a great many cases of this kind, principally under the Metropolis Building Act, and we are here not without authority, because we have the highest authority, namely, *Galloway* v. *Mayor of London* (1), where Lord Chelmsford, on motion for judgment, puts that construction on those words which I have adopted in the present case. But then another and a very material matter arises with regard to the houses themselves; and the second thing the local board assume is that they are entitled to deal, not merely with the actual construction of houses, when they are finished or partly finished, but that they are entitled to deal with that portion of the Local Government Act, 1858, which requires that any person who constructs buildings must deposit plans and sections. Now that is a matter no doubt very different from the actual construction of the building itself. It is one thing to say you must build a building, a certain structure; but another thing to say, as condition precedent to that, you must deposit certain plans and give a certain section. But when one comes to look at the thing, there again the reason of the thing tells one it is most reasonable to say you should begin your building and deposit this plan and section. It is a simple matter known to all architects and builders, and far more reasonable to ask for that deposit to be made than to say the building should be built, and then afterwards if it did not fall in with certain regulations, that it should be pulled down and destroyed. It is quite true in many cases it shifts the onus on to the builder, and in many cases it may be the local board may not be able to justify their acts with regard to the structural character of the building, because in some respects it may be they cannot exactly define whether they are things that can be made good or not. But it is evident that the position in

(1) Law Rep. 1 H. L. 34.

point of law is a clear one when they assert, "You have not deposited notices of plans and sections which ought to be deposited by you who intend to construct certain buildings." Therefore, it seems to me, as far as the reason and spirit of the Act are concerned, to come within it. But then does it come within the strict words? I listened with great attention to the argument of Mr. Petheram, who says that the whole of it is to be governed by these words: "And they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings," and so on. But it does not seem to my mind that this is so at all, because the power is really and substantially to make bye-laws, and having made them, this section says they may make bye-laws, "As to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws." Therefore it seems to me that the power exists of making a bye-law which enables them to pull down any work begun or done in contravention of the bye-laws, whether that contravention be building contrary to the structural requirements, or building without having deposited a proper plan. In accordance with that view the 37th bye-law is made, and I think it is a perfectly good bye-law, and that what was done by the corporation in the present case was within the powers given to them by it. I will only say a word more with regard to the construction of the bye-law. It seems to me that we should deal with this on a wrong principle, if we dealt with it differently from that on which we should deal with the construction of a conveyance or an Act of Parliament. It is a case in which we should look to the general spirit and intention of the bye-laws in the same way as we should to the general spirit and intention of an Act of Parliament, giving a proper and reasonable effect to the words, and not being guided by any arguments of hardship on the one side or the other, but giving the words used an intention according to the spirit which appears in other parts of the bye-laws and in the statute on which they are founded. Several authorities were cited in this case: I do not know that they give very much assistance, but it is only right, perhaps, that I should

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allude to them. With regard to two cases, *Young* v. *Edwards* (1) and *Hattersley* v. *Burr* (2), I do not see that they at all hamper us or give us any difficulty in the decision at which we are about to arrive. But if they did, we have the case of *Hall* v. *Nixon* (3), where the matter was very fully considered; and I should adopt every word said by the learned judge in giving judgment in that case. It seems to me, therefore, that this 37th is a bye-law properly made within the power of the authority that made it.

HUDDLESTON, B. The defendants justify their act as done in pursuance of bye-law 37, and deny that any unnecessary violence was used. The main question is as to the power to make this 37th bye-law. It is said that the houses were built in contravention of two bye-laws, namely, the 3rd and the 32nd. Now that, of course, involves this proposition—had the Corporation of Portsmouth power to make those bye-laws? The only power they have to make bye-laws is by virtue of the Public Health Act, 1848, the Local Government Act, 1858, and the Local Government Supplemental Act, 1864, No. 2, and the section that applies and gives them the power more particularly is s. 34 of the Local Goverment Act, 1858. Now it is contended on the part of the plaintiffs that the powers there given are only with reference to roadways and streets and the external construction of the buildings, and a sufficient space round the buildings, and the works underground, and that they have no reference to the construction of the buildings themselves; that, therefore, the 3rd bye-law, which deals with the erection of the buildings in the street, and the 32nd bye-law, which deals with the plans with reference to those buildings in the street, are ultrà vires. The whole of this question turns on what interpretation we shall give to the words "new streets" in the 34th section. Is that to be confined to the narrow interpretation of merely the roadways, or are we to take it in the popular meaning of the words, namely, street consisting of a roadway and the houses on each side of the street? There is no interpretation clause of the Local Government Act of 1858, as applicable to street; but the Public Health Act of 1848 is incorporated with

(1) 33 L. J. (M.C.) 227. (2) 4 H. & C. 523.
(3) Law Rep. 10 Q. B. 152.

the Local Government Act of 1858, and there is an interpretation clause in the Public Health Act, 1848, to this effect: "The word street shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, or passage within the limits of any district." What is the meaning of "shall apply to and include," unless "street" means something more than the roadway, that is to say, the street with the houses. That really seems the reasonable and proper interpretation of the word "street." The object of this Public Health Act is to secure not only proper roads, proper ventilation, proper means of transit through the street, but also the comfort, and I expect also the comeliness, of the buildings and of the town itself. Using the word "street" in the ordinary, I do not say popular, sense, but strictly natural interpretation, the Act provides by this first subsection that the board may make bye-laws with reference to the level, and the width, and the construction of the new streets, not merely the construction of the roadway, but the construction of the roadway plus the buildings on each side. Therefore they would have the power to make bye-laws with reference, among other things, to the time when the buildings should be erected, and the character of those buildings, and also with reference to the structure of the walls of the buildings, and the sufficiency of the space about the buildings, so that they may secure free circulation of air, and also, no doubt, what is very important, the drainage of waterclosets, and so on. Having that power "they may further provide for observance of the same,"—if I am right in the interpretation of the words "new street," that would include bye-laws as to buildings,—"by enacting therein," that is in the bye-law, "such provisions as they think necessary as to the giving of notices as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings"—well, it would be much more natural to apply "plans and sections" to the buildings than to the construction of the roadway—"plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws." Thus, the

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local board is to have power to require notices to be given, and, in default, to pull down the work begun or done in contravention of such bye-laws. And I may add, looking at the 34th section, there is a proviso that no such bye-law shall affect any building erected before the date of the constitution of the district, which implies that the bye-laws may deal with all the buildings built thereafter. If that interpretation be right the corporation had clearly power to make the third bye-law, which provides that "no building shall be erected by the side of any new street or proposed new street, which will form the only carriage approach, until such street has been constructed to the approval of the local board," and to make the 32nd bye-law, which requires the deposit of the plans; and to provide for those being carried out by providing penalties in the 37th bye-law; and to avail themselves of the power of the 34th section, to direct the houses which are built in contravention of any of the bye-laws to be pulled down. I think the corporation have shewn a justification for the acts done, with the exception of that which the jury state they did with more damage than was necessary. That we will decide hereafter, when we have heard Lord Blackburn's view of the evidence.

Judgment for the defendants on the demurrer.

Solicitors for plaintiff: *Saunders, Hawksford & Bennett.*
Solicitor for defendants: *J. Howard, Portsmouth.*

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June 22.

Defamation—Person convicted of Felony—Effect of enduring the Punishment—Justification—9 Geo. 4, c. 32, s. 3.

In an action by the editor of a newspaper for libel in calling him a "felon editor," the defendants justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labour. The plaintiff replied that after his conviction he underwent his sentence of twelve months' imprisonment and hard labour, and so became as cleared from the crime and its consequences as if he had received the Queen's pardon under the great seal. On demurrer:—

Held, a good reply.

Semble, that it is defamatory to call a person who has been convicted of felony "a convicted felon," if he has received a pardon or suffered his sentence.

CROSS-DEMURRERS to a statement of defence and reply. The following are the material parts of the pleadings:—

Statement of claim. 1. The plaintiff set out that he was the proprietor and editor of a newspaper called the *Dartmouth Advertiser*, and the defendants were the proprietors, printers, and publishers of a newspaper called the *Western Daily Mercury*, and that they, or some or one of them, also edited and wrote for that newspaper.

4. The defendants, in their paper of the 24th of April, 1876, wrote, printed, and published certain words, as follows:—

"The narrative must be deferred till next week. . . . The history of the *Advertiser*, too, must stand over . . . its present editor is a convicted felon. The case in which a certain John Leyman, printer, was sentenced to twelve months' hard labour for stealing feathers—a case of which Mr. Foster may have heard since he is so familiar with the chief actor—will be reproduced."

5. The defendants, in their paper of the 1st of May, 1876, wrote, printed, and published certain words, as follows:—

"There still remain to be recorded Mr. Foster's controversies with the town council of Dartmouth . . . and the facts regarding his newspaper" (meaning the plaintiff's said newspaper, the *Dartmouth Advertiser*), "and its bankrupt and felon editors" (meaning the plaintiff). "The narrative must be deferred till next week. It is worth the telling."

The plaintiff alleged that the words in paragraphs 4 and 5

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were published falsely and maliciously, and were defamatory, and he also alleged special damage.

The statement of defence, paragraph 3, denied that the word "bankrupt," in the quotation in the 5th paragraph of the statement of claim, was intended to, or did refer to, the plaintiff and continued thus:—

4. The plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers.

5. The words in the 4th and 5th paragraphs of the statement of claim complained of were, and are, part of certain articles printed and published in the defendants' newspaper, each of which articles was, and is, a fair, bonâ fide comment upon the conduct of the plaintiff in his public character, and as the nominal editor and proprietor of the *Dartmouth Advertiser*, a public newspaper, and was printed and published by the defendants as and for such comment, and without any malicious motive or interest whatever.

The reply, after admitting paragraph 3 of the defence, continued:—

3. As to the 4th paragraph of the statement of defence, the plaintiff (so that such admission be not in any way extended or taken to mean that he ever was, in fact, guilty of the offence referred to) admits the allegations contained in such 4th paragraph. But the plaintiff further says that he has never been convicted of felony save on that one occasion mentioned in the 3rd paragraph of the statement of defence. On that occasion he was convicted of the supposed felony by a court duly having jurisdiction in that behalf, the court of quarter sessions for the county of Cornwall, and the court, having jurisdiction as aforesaid, in the exercise of such jurisdiction, adjudged that as a punishment for the supposed felony, the plaintiff should be imprisoned and kept to hard labour for twelve calendar months. The conviction took place several years ago, and the plaintiff, as the defendants well knew, duly endured the punishment to which he was so adjudged as aforesaid for the supposed felony, and thereby became and was, and has ever since been, and is in the same situation as if a pardon under the great seal had been granted to him as to the supposed felony whereof he was convicted as aforesaid.

The plaintiff demurred to the 4th and 5th paragraphs of the statement of defence, and the defendant to the 3rd paragraph of the reply.

At the trial before Blackburn, J., without a jury, at the Exeter summer assizes, 1876, the learned judge gave judgment for the defendant on the ground that the statement meant that the plaintiff was convicted, and that it was literally true.

A rule was afterwards obtained on behalf of the plaintiff for a new trial, and came on to be argued with the demurrer.

June 13. *Cole, Q.C.*, for the defendants. The learned judge was right in saying that the statement meant that the plaintiff had been convicted. The plaintiff relies on *Cuddington* v. *Wilkins* (1), and 9 Geo. 4, c. 32, s. 3 (2), but this is not a question of status, and though the effect of the statute is to restore a felon, who has endured punishment, to the civil position that he previously held, it cannot alter the fact that at one time he was a felon. In *Gwynn* v. *South Eastern Ry. Co.* (3), it was held that the question for the jury was whether the defendants' account of the conviction was substantially correct, and the learned judge found in this case that the defamatory words were correct: see also *Alexander* v. *North Eastern Ry. Co.* (4); *Biggs* v. *Great Eastern Ry. Co.* (5)

Collins, Q.C., and *Pitt Lewis*, for the plaintiff. If the statement is not strictly accurate the plaintiff is entitled to the verdict. It is that the plaintiff *is* a "convicted felon," and a "felon editor," which is an inaccurate statement, for the plaintiff never was at the same time felon and editor. If the defendant had received a

(1) Hob. 81.

(2) 9 Geo. 4, c. 32, s. 3, is as follows:—"And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged: Be it therefore enacted that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony."

(3) 18 L. T. (N.S.) 738.

(4) 6 B. & S. 340; 34 L. J. (Q.B.) 152.

(5) 16 W. R. 908.

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pardon it would have cleared him from the infamy and all other consequences of his crime, and he would have had an action for a scandal in calling him felon: Hawkins' Pleas of the Crown, book ii., ch. 37, s. 48, citing *Cuddington* v. *Wilkins* (1). The infamy flows from the crime: *Rex* v. *Crosby* (2), and when that is pardoned the infamy no longer exists. Then the statute, 9 Geo. 4, c. 32, s. 3, places the plaintiff in the same position as if he had received a pardon, and the cases cited apply, and are conclusive in his favour.

Cur. adv. vult.

June 22. CLEASBY, B., read the judgment of himself and POLLOCK, B. In this case the question appears to be well raised upon the demurrer in the pleadings.

It is an action for libel, and two libels are complained of contained in the newspaper called the *Western Daily Mercury*, of the dates of the 24th of April, 1876, and the 1st of May, 1876.

If the paper of the 24th of April is considered, a different question might arise from that which does arise upon the paper of the 1st of May. It seems quite clear that the defendant is bound by what he writes on the 1st of May, without reference to what was written on the 24th of April, unless to get at the meaning of what was written on the 1st of May it is necessary to refer to what was written on the 24th of April. In the present case the letter of the 1st of May has by itself a clear meaning, and a person buying it on the 1st of May without having seen the paper of the previous week would necessarily give it that meaning. The facts of the present case, as they appear upon the pleadings, may be stated as follows, for the purpose of raising the question.

By the statement of claim the plaintiff states he was the editor of a newspaper called the *Advertiser*, and complains that on the 1st of May the defendant in his newspaper referred to the plaintiff as "the felon editor." By the statement of defence the defendant justifies this reference by alleging that the plaintiff had been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers. In his reply the plaintiff alleges that after his conviction, which took place some years ago, the plaintiff

(1) Hob. 67 & 81; see also *Celier's Case*, Sir T. Raym. 369.
(2) 2 Salk. 689.

underwent his sentence of twelve months' imprisonment and hard labour, and so became as cleared from the crime and its consequences as if he had received the Queen's pardon under the great seal. To this there is a demurrer, and so the question is raised.

In the statement of defence there was also a paragraph that the alleged libel complained of was a fair comment upon the conduct of the plaintiff in his public character as editor of the *Advertiser*, and to this there was also a demurrer in the reply. This was not argued before us, it being clear that such a justification could not be upheld in law, and upon that demurrer there must, of course, be judgment for the plaintiff.

But the other question is one of some difficulty; that question being whether a man who has been convicted of felony, and undergone his sentence, can afterwards be called a felon, without making the person calling him so liable to an action. We cannot doubt that calling a man who is the editor of a newspaper a felon editor is the same as calling him a felon. The question could not have been raised before the passing of 9 Geo. 4, c. 32. By the 3rd section of that Act it is enacted as follows:—"And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital who have undergone the punishment to which they were adjudged; Be it therefore enacted: That where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath or shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always that nothing herein contained nor the enduring of such punishment shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony." The general title of the Act related to evidence, but the particular recital to this section introduces a new question—the civil status of particular persons. The question, therefore, becomes, whether a person who has committed a felony, or been convicted of a felony, and received the Queen's pardon, can be called a felon. Upon this question the authorities are clear.

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The case of *Culdington* v. *Wilkins* (1) is as follows:—Cuddington brought an action of the case against Wilkins for calling him thief; the defendant justified, because beforetime he had stolen somewhat: The plaintiff replied that since the supposed felony the general pardon in the seventh year of the king was made, and makes the usual averment to bring himself within the pardon. Whereupon the defendant demurs: see Staundford plac., Coronæ, p. 180. That if a man arrested for felony break prison, he shall lose his battail, but yet if the king pardon him, that it is restored: F. Coronæ, p. 281; 1 & 2 E. 3 F. Coronæ, 154. So here the felony is by pardon extinct. And in the end this case was adjudged for the plaintiff, though it may be he knew him not to be within the pardon, for there is no cause to favour idle and injurious words. But perhaps if he had arrested him for the felony after pardon, it might have been excused if he knew it not, because it is an act of justice: vide Residuum, infra, fol. 81. The case is afterwards stated more fully at p. 81, when I suppose judgment was given, and after stating the facts it is said that it was adjudged for the plaintiff, for the whole Court were of opinion that though he were a thief once, yet when the pardon came it took away, not only poenam, but reatum, for felony is contra coronam et dignitatem regis, and it proceeds:—"Now when the king had discharged it, and pardoned him of it, he hath cleared the person of the crime and infamy, wherein no private person is interested but the commonwealth, whereof he is the head, and in whom all general wrongs reside, and to whom the reformation of all general wrongs belongs." And there is much more to the same effect. The case is again referred to in a later part of the same reports, four years afterwards, at p. 293, in a case of *Searle* v. *Williams* (2), where Hobart, C.J., says: "And therefore I hold, that if a man shall call him felon, or thief, he may have his action, as upon any other pardon, which we resolved in the case of *Cuddington* v. *Wilkins*." (1) Here the word felon is made use of which makes it the same as the present case.

It is unnecessary to refer to the numerous other authorities cited in the argument in support of so clear and unquestioned a decision, and one so reasonable and so just. One text-book may

(1) Hob. 67. (2) Hob. 288.

be cited, Hawkins' Pleas of the Crown, book 2, ch. 37, s. 48 (title Pardon), where in the margin the authorities are collected. He says: "As to the second general point, what is the effect of a pardon, I take it to be settled at this day that the pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon, after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction; because the pardon makes him as it were a new man, and gives him a new capacity and credit."

The conclusion is inevitable, therefore, that if calling the plaintiff a felon editor involves the calling him a felon, the plaintiff is entitled to his action, and there must be judgment for the plaintiff upon the demurrer to the reply.

It is not necessary to decide what would have been the result it the defendant had only said of the plaintiff as he does in the first letter—"he is a convicted felon."

In that case there would be more doubt in the absence of any decided case as to the effect of these words; and it might be said, if you choose to read the words favourably for the defendant, that they only mean "he has been convicted of felony." But it rather seems to us they ought not to be read so favourably, and that the result ought to be the same. It is not true to say of the plaintiff that he is a convicted felon; he is a convicted felon who is in the position of a pardoned felon, and the felony is at the time extinguished. The calling him a felon, and attaching the infamy of felony to him, would import that he had not been pardoned. It would have been a different matter if the defendant had written of the plaintiff that he had formerly committed a felony or been convicted of felony. That would have been strictly true, and could have been justified, although the fact of the sentence having been suffered was withheld. At least such is our opinion, and the distinction is taken in the case of *Cuddington* v. *Wilkins* (1), at page 82 of the report. The distinction is not a verbal one merely, but the two statements would have a different effect. A man stating that another was a felon would be listened to as in-

(1) Hob. 67.

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forming his hearers that the man was infamous and to be shunned, but a man who stated that another man (perhaps the editor of a newspaper, and in a respectable position), had been convicted of a felony twenty or thirty years ago, would probably himself be more condemned than the man he spoke of. But, however small the distinction may be, a slanderer should take care to be within the truth. The Court says in the case of *Cuddington* v. *Wilkins* (1), where the distinction is taken, "There is no cause to favour idle and injurious words." The cases are numerous in which the injurious statement has gone beyond the truth, and has been considered actionable.

The case came on for trial before Mr. Justice Blackburn, at the Exeter summer assizes. It was intended to be a jury trial, but there was no jury to be had. The facts had all come out in a previous trial, and the learned judge expressed (for the benefit of the parties) his intention to direct a verdict for the defendant if the case was tried. The case was then taken for convenience before the judge without a jury, and the following is the judgment as reported by his Lordship:—"I think that the statement in the newspaper means that he was convicted, and is literally true, and therefore the plaintiff cannot recover damages. I shall give judgment for the defendant with costs on the 4th day of next sittings." This was done, no doubt, to enable the plaintiff to apply to the Court, and an application was accordingly made, and the case was argued before my Brother Pollock and myself. Having regard to the authorities referred to, we cannot think the learned judge was correct in saying that the statement should be read as a statement that the plaintiff had been convicted, and was literally true. The reasons have been already given. It appears to us that judgment ought to be given for the plaintiff on the demurrers, and that there should be a new trial, for the purpose chiefly of assessing the damages which the plaintiff might take as he was advised on the two libels, or on that of the 1st of May.

Judgment for plaintiff.

Solicitors for plaintiff: *Coode, Kingdon, & Cotton, for John Daw & Son, Exeter.*

Solicitors for defendants: *Surr, Gribble, & Dunton, for J. W. Wilson, Plymouth.*

(1) Hob. 67.

KNOWLES & SONS, LIMITED, APPELLANTS; McADAM, SURVEYOR OF TAXES, RESPONDENT.

1877
Dec. 5.

Income Tax—Mines and Minerals—Balance of Profits or Gains—Deduction for exhausted Capital—5 & 6 *Vict. c.* 35, *s.* 100; *Sch. D., Rules* 1, 3; *s.* 159—29 & 30 *Vict. c.* 36, *s.* 8.

A colliery company bought freehold and leasehold coal mines, and raised some of the coal and sold it. At the end of the first year's working, the mines, by reason of the coal gotten during the year, were worth 10,424*l.* less than the price for which they were bought. The company, being assessed to the income tax under Sched. D in respect of the profits of their business as colliery proprietors for that year, claimed to deduct 10,424*l.* for exhausted capital:—

Held, first, that by virtue of 29 & 30 Vict. c. 36, s. 8, the mines were assessable under Sched. D of 5 & 6 Vict. c. 35, s. 100, and not under Sched. A; secondly, that in estimating "the full amount of the balance of the profits or gains" of the business under the 1st rule of Sched. D, the deduction ought to be made, and that it was not one of the deductions forbidden by the 3rd rule of Sched. D or by s. 159.

CASE stated by the commissioners for the special purposes of the Income Tax Act, under 37 Vict. c. 16.

At a meeting of the commissioners for special purposes, held at Somerset House, on the 17th of December, 1875, for the purpose of hearing appeals under the Income Tax Act for the year ending the 6th of April, 1875, the appellants, a company carrying on business as colliery proprietors at Pendlebury and elsewhere, appealed against an assessment in the sum of 226,824*l.* made on them under Sched. D of 16 & 17 Vict. c. 34, in respect of the profits of their business as colliery proprietors.

At the hearing of the appeal the commissioners were of opinion that the assessment should be reduced to the sum of 216,827*l.*, but it was urged on behalf of the company that a sum of 10,424*l.* should be deducted, on the ground that in estimating the amount of assessable profits the commissioners ought to allow as a deduction that sum which was claimed by the company as "depreciation," and which, as stated in the annual report for the year ending the 31st of December, 1874, is "based on a calculation of the extent of coal available, and the duration of existing leases, but it may be modified as future circumstances require." It was further explained that the term "depreciation" in the

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balance-sheet was used to shew to the shareholders the deterioration or difference in the value of their property at the end of the year, and after working out of a year's coal, and the expiration of a year of their leases, as compared with the value of such property at the beginning of the year; or, in other words, that a revaluation of the property shewed that it was worth at the end of the first year 10,424*l.* less than at the time of the purchase twelve months before.

The commissioners were of opinion that they were precluded by the 3rd rule applicable to the first case of Sched. D, in s. 100 of 5 & 6 Vict. c. 35, and by s. 159 of that Act, from allowing the deduction claimed, and confirmed the assessment in the sum of 216,827*l.*

The above case was thereupon, at the request of the company, stated by the commissioners, and was partly argued before the Exchequer Division (Cleasby and Pollock, BB.) on the 24th of January, 1877, when the Court desired that the commissioners should state more clearly the circumstances under which the deduction in respect of the 10,424*l.* was claimed. The commissioners accordingly stated the following addenda.

The company's colliery property comprises both freehold and leasehold mines, which were purchased by them, the price paid for the leasehold coal mines, subject to an average royalty rent of 7*d.* per ton, and having an average of thirty-two years to run, being 717,421*l.*; the purchase-money for the freehold mines being 67,550*l.*

At the end of the first year's working, which is the year of the assessment in question, it was ascertained that from the company's leasehold collieries 844,877 tons, and from their freehold pits 62,000 tons of coal had been wrought or gotten and sold in that year,—the total quantity, therefore, being 906,877 tons.

The appellants allege that in ascertaining, by a correct and accurate balance-sheet, the profits made in that year, they valued their coal mines at 10,424*l.* less than the sum for which they had purchased them at the commencement of that year, which sum (as the appellants allege) fairly represented the diminution in their value by reason of the coal gotten as above mentioned, and which sum, for the purposes of such balance-sheet, was technically, but

perhaps incorrectly, referred to as depreciation. Of the sum of 10,424*l.*, the sum of 721*l.* 17*s.* 11*d.* represents the diminution in the value of the freehold mines, and the balance that of the leasehold.

The appellants further allege that, in ascertaining the profits of the freeholds, no sum is set against or deducted from the gross receipts on account of any rent assumed to be paid in respect thereof.

Herschell, Q.C. (*T. J. Saunderson* with him), for the appellants. The tax is assessable under 5 & 6 Vict. c. 35, s. 100, Sched. D, coal mines having been transferred from No. III. Sched. A to Sched. D, by virtue of 29 Vict. c. 36, s. 8. (1) "The balance

(1) Sched. D of 5 & 6 Vict. c. 35, s. 100, contains the following enactments:—"1st Case. Duties to be charged in respect of any trade, manufacture, adventure or concern in the nature of trade, not contained in any other schedule of this Act.

"RULES.

"1st. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, or concern, upon a fair and just average of three years . . . .

"3rd. In estimating the balance of profits and gains chargeable under Sched. D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern, nor for any sum expended for the supply of repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure or concern beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts except bad debts proved to be such to the satisfaction of the commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an insurance or contract of indemnity."

Sect. 159 enacts "That in the computation of duty to be made under this Act in any of the cases before mentioned either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall

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of the profits or gains" of a year's trading cannot be ascertained without taking stock at the beginning and end of the year. If a coal merchant at the beginning of the year buys at the price of 1*l.* a ton 10,000 tons of coal which is already brought to the surface of the earth, and sells thereof during the year 1000 tons for 1500*l.*, his balance of profit is not the whole 1500*l.*, but 500*l.*, the difference between what he paid and what he sold the 1000 tons for. This will not be disputed. What difference can it make in principle if the coal which the merchant buys is aboveground or underground? It is on this principle that the deduction in the present case is claimed. Instead of having 10,000 tons left at the end of the year, the coal merchant has only 9000 tons; and instead of having all the coal in the mine as originally bought, say one million tons, the colliery company have only the one million less the 100,000 tons raised and sold during the year. The company must deduct the price which they paid for the 100,000 tons from the price at which they have sold them. The difference (after deducting the expenses of working, which are not in question) will be the balance of profit for the year. Suppose

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not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act; nor to make any deduction on account of any annual interest, annuity or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments; nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed or of loss sustained in any trade, manufacture, adventure or concern, or in any profession, employment, or vocation."

By s. 8 of 29 & 30 Vict. c. 36: "The several and respective concerns described in No. III. of Sched. A of 5 & 6 Vict. c. 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Sched. D of the said Act, so far as such rules are consistent with the said No. III. . . . ."

No. III. of Sched. A of 5 & 6 Vict. c. 35, contains "Rules for estimating the lands, tenements, hereditaments or heritages hereinafter mentioned which are not to be charged according to the preceding general rule.

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited. . . . .

"2nd. Of mines of coal, . . . on an average of the five preceding years, subject to the provisions concerning mines contained in this Act."

the company sell the 100,000 tons for less than the price at which they bought them, then, if the contention of the Crown be right, the company must pay the tax on the price at which they sold, though on the year's trading there has been a balance of loss, not profit. The argument of the Crown involves this consequence, that if a man buys or succeeds by inheritance to a stock of coal above-ground, or a mine below-ground, and sells the whole within the year, he must pay the tax upon the net proceeds, though the whole of his capital is exhausted. In such a case he is entitled to deduct from his net proceeds the market value of the stock of coal, or the mine, at the time at which he acquired it. "What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land": per Lord Cairns, *Gowan* v. *Christie.* (1) Suppose at the end of the leasehold term this company has worked and sold the whole of the coal for less or exactly the same amount as they paid for it, there will have been no profit, and yet, according to the Crown, the company will have been taxable every year upon the amount of the net proceeds. In construing the statute, allowance must be made for wasted or exhausted capital before computing profit. This is the doctrine of all political economists. "Profits really consist of the produce or its value remaining to those who employ capital in industrious undertakings, after all their necessary payments have been deducted and after the capital wasted or used in the undertakings has been replaced. If the produce derived from an undertaking, after defraying the necessary outlay, be insufficient to replace the capital expended, a loss will have been incurred; if the capital be merely replaced, and there is no surplus, there will neither be loss nor profit." McCulloch's Principles of Political Economy, 4th ed. chap. vii. p. 530.

Dicey, for the respondent. It is an error to suppose that s. 8 of 29 Vict. c. 36, transfers mines from No. III. Sched. A to Sched. D; it only directs that in some respects they shall be assessed in the same way as if they were under Sched. D. The appellants' doctrine as to computing profit is correct from the point of view of political economy, but the Income Tax Act disregards the doctrines of political economy. The tax, though in fact it has continued for

(1) Law Rep. 2 H. L., Sc. at p. 284.

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several years, has always been imposed in theory and in language for one year only, and it is intended to get from all a proportion of their "income" for that year. Mines are assessable under Sched. A, s. 60, of 5 & 6 Vict. c. 35, as "lands, tenements, and hereditaments," and upon their "annual value," not upon a balance of profits. But assuming they are brought under Sched. D, then this deduction is expressly forbidden by the words of the 3rd rule, "nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade," &c.; and by s. 159. The present deduction is really on account of money set aside for depreciation of capital, and that has been held not allowable: *Forder* v. *Handyside.* (1) That decision concludes the question.

Herschell, Q.C., was not heard in reply.

KELLY, C.B. I have not had the advantage possessed by my learned Brothers of hearing this case argued on the previous occasion, but when I consider the nature of the tax and of the case before us I entertain no doubt upon the matter.

First, it is quite clear that s. 8 of 29 Vict. c. 36 transfers the present case from Sched. A to Sched. D. Now the 1st rule of Sched. D says: "The duty to be charged in respect thereof"—that is, "of any trade, manufacture, adventure or concern in the nature of trade," which includes the business of a colliery company formed for the purpose of working coal mines—"shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern upon a fair and just average of three years," and so on. That is the substantive enactment, the construction of which must decide the present question, unless it is qualified by something which comes after. Now what is "the balance of the profits or gains?" Take the simplest case. A man buys a bale of cotton for 20*l.* and sells it again for 25*l.*, no expenses being incurred except the price of the bale. His balance of profit is 5*l.*, which remains to him after having repaid himself everything he paid to obtain the bale. Let us go further and suppose a man buys a bale of cotton for 20*l.*, and obtains by a legacy a chest of tea the market value of which is

(1) 1 Ex. D. 233.

20*l.*, and sells the two for 45*l.* Is not his profit the 5*l.* only? If his profit is 25*l.*, then there is no escape from the proposition that, where a man succeeds by inheritance to a property and sells it, the price he receives is taxable as income. Suppose a merchant dies and bequeaths to his son a warehouse containing 20,000 bales of cotton. The son carries on the trade and sells 1000 of those bales. Is his profit what he receives for those bales without any deduction? No, his profit is the price at which he sells less the price he has paid for what he sells, or, if he has not bought it, less what he would have had to pay if he had bought it.

Apply this principle to the case of a coal mine. Suppose a man pays 1000*l.* for a lease of the mine for one year only. At the end of the year he has got all the coal in the mine and sold it for 1200*l.*, the expenses of labour and materials being 100*l.* Is his profit 1100*l.*? It would be an abuse of language to say so. His profit is what remains in his pocket after deducting the expenses, namely 1000*l.* for the liberty to get the coal and 100*l.* for the cost of getting it. That is, his profit is 100*l.* only.

Now if that be true in the case of a lease for one year, it must be true in the present case, where the leases have an average of thirty-two years to run, and where the lessees get a portion of the coal year by year. There can be no difference in principle. Upon the construction, therefore, of the 1st rule of Sched. D I think there can be no doubt the deduction claimed ought to be allowed.

Then it is said that the deduction is forbidden by the words of the 3rd rule, "nor on account of any capital withdrawn." Those words do not touch the present case. They would apply to a case where a man has a capital of say 40,000*l.* in a coal mine, and withdraws 1000*l.* thereof in order to build a coal warehouse, or some such purpose. That portion of capital so withdrawn must not be deducted before computing the profits of the year in question. And there are various other ways in which capital may be withdrawn which would not be an element in estimating the balance of profits. Then there are other words in the 3rd rule, "nor for any sum employed or intended to be employed as capital in such trade," &c. Those words, I think, refer to additional capital which a man puts into his business.

Then we come to s. 159, which enacts that it shall not be lawful

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to make any other deductions than such as are expressly enumerated in the Act, "nor on account of any diminution of capital employed or of loss sustained in any trade," &c. Those words, "diminution of capital," do not apply where a man sells an article which he purchased, but where, for instance, his capital is diminished by his goods being destroyed by fire, or where having invested 20,000*l.* in one business he withdraws 5000*l.* and invests it in some other business. In neither of those cases is the diminution of capital an element in computing the balance of profit.

I think, therefore, that the present deduction does not come within any of those forbidden by the statute, and that the appellants are entitled to judgment.

CLEASBY, B. The present case, involving the application of the rules for assessing the income tax, is of a class in which one must look at each case and be careful not to generalise, so as to include other and different cases. This is not the case of an owner of land opening a quarry or mine, and either working it himself or letting it upon a royalty, and it must be understood, so far as I am concerned, that I am not deciding that case.

Now, I take it to be quite clear that in the present case s. 8 of 29 & 30 Vict. c. 36, places the assessment under "the rules prescribed by Sched. D" of 5 & 6 Vict. c. 35. The words are, "so far as such rules are consistent with" No. III., Sched. A, of 5 & 6 Vict. c. 35. Unless this enactment applies to the case of a colliery company formed for the purpose of carrying on the business of working coal mines, no case can be suggested to which it would apply. If the case be put of an owner of land opening a quarry and working or letting it, it may possibly be that such a case comes under Sched. A, but as to that I give no opinion. It being clear that this colliery company comes under Sched. D, we have only to apply the words of Sched. D treating it as a trade or business. As soon as we get to this point the case is free from difficulty. The 1st rule of Sched. D says: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade." &c. You cannot get at the balance of the profits or gains without taking stock at the beginning and end of the year.

This is the necessary meaning of the 1st rule. This was hardly disputed, but the case was said to come under the 3rd rule, and the whole argument turns on that. If there be anything in the 3rd rule which is applicable we are bound to apply it, however inconsistent it may seem with the general idea of "the balance of the profits or gains." But there is nothing in the 3rd rule inconsistent with the idea of stocktaking. It is quite unnecessary to go through all the various items mentioned in the 3rd rule. It is enough to say that this is not a case of "capital withdrawn" from the concern; it is a case of capital consumed in making the profits.

With regard to *Forder* v. *Handyside* (1), the principle of the income-tax is that you must take the result of the trading of a year or of an average of years, and that you cannot put by a sum of money for depreciation of capital in addition to the deduction allowed for repairs. If you did you would depart from the principle of the tax, and the Act expressly provides against it. I almost wonder that that case was argued at all, but it has nothing whatever to do with the present case.

I think, therefore, that the appellants are entitled to judgment.

POLLOCK, B. I entirely concur. The question has arisen through a misapprehension caused by the company in the first instance using the word "depreciation." Now that the nature of the deduction has been explained, it is clear it is one which must be made before "the balance of profits" is computed.

Judgment for the appellants, with costs.

Solicitor for appellants: *H. T. Chambers.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) 1 Ex. D. 233.

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Nov. 23.

WEIR *v.* BARNETT AND OTHERS.

Company—Fraudulent Prospectus—Liability of Directors for fraudulent Statement of Agent—Principal and Agent.

A company which had been formed to work a mine having been compelled to cease working for want of funds, money was advanced to the company by some of the directors, and among them by Barnett and Baldwin. Afterwards at a general meeting of the company held in order, inter alia, to provide for the existing deficit and for working expenses, the directors were authorized by the meeting to issue debentures on such terms and for such amount as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus, bearing the names of Barnett and Baldwin and of Bell and others as directors, and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others subscribed and paid for debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless the plaintiff brought an action for damages against Barnett, Baldwin, and Bell, in respect of the statements in the prospectus, some of which were alleged to be fraudulent.

The jury found as to all three defendants that the prospectus contained statements of fact which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money; that none of the false statements were made by Barnett or Baldwin or Bell personally, or by the authority of either, but that the statements were within the authority of the brokers as agents. As to Barnett (who had been absent from England while the debentures were being issued) the jury found that he had left authority to the directors to cause a prospectus to be issued to raise money on debentures, but not to make any false statements; that it was within the scope of their authority to issue a prospectus, but such only as the draft which Barnett had prepared before he left England, and which contained no false statements; that Barnett received benefit from the fraud of the brokers, viz., the repayment of the money advanced by him to the company, but without knowledge of the fraud. As to Baldwin the jury found that he received benefit from the fraud; which the Court took to mean that, though he was not aware of the false statements contained in the prospectus before it was issued, he became aware of them before he was repaid the money which he had advanced to the company. As to Bell the jury found that he received no benefit. Upon these findings:—

Held, that the brokers were really the agents not of the directors but of the company, the directors being intervening agents, and that the finding of the jury upon this point was contrary to the evidence; that the repayment of the moneys to Barnett and Baldwin, though in some sense consequent upon, had no necessary connection with the fraudulent statements in the prospectus; that Barnett and Baldwin were not the principals of the brokers, so as to bring the former within the rule that a principal is answerable where he has received a benefit from the fraud of an agent acting within the scope of his authority; and that judgment must, therefore, be entered as well for Barnett and Baldwin as for Bell.

THIS was an action against six directors of a company incorporated in 1872 under the Companies Acts, 1862 and 1867, for

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damages sustained by the plaintiff who had subscribed and paid for debentures of the company, upon the faith of certain statements in a prospectus issued by the authority of the defendants, some of the statements being alleged to be false and fraudulent to the knowledge of the defendants. The debentures had since become worthless.

The facts proved at the trial at Westminster before Huddleston, B., the findings of the jury, and the questions arising thereon, are stated in the judgment.

April 27, 28, 30; May 3, 4, 7. *Sir H. S. Giffard, S.G.*, *A. Charles, Q.C.*, and *W. Barber*, for the plaintiff, moved to enter judgment against the defendants Barnett and Bell, and opposed motions to enter judgment for the defendant Baldwin, and for a new trial as to the defendant Dymes.

The principle which governs this case was laid down by Parke, B., in *Cornfoot* v. *Fowke* (1): "It must be conceded that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, *knowingly* commit a fraud in making it, not only is the contract void, but the principal is liable to an action. Lord Holt held that in an action of deceit for selling one sort of silk for another, upon evidence that there was no actual deceit in the defendant, but that it was in his factor beyond sea, the merchant was liable": *Hern* v. *Nichols*. (2) This principle was upheld in *Udell* v. *Atherton* (3) by Pollock, C.B., and Wilde, B. To make the principal liable the fraud must be committed by the agent acting within the scope of his authority: *Coleman* v. *Riches* (4); and in the present case Stewart & Lambe were acting within the scope of their authority. The finding of the jury, that they were the agents of the defendants, is amply justified by the evidence. In *Barwick* v. *English Joint Stock Bank* (5) the judgment of the Exchequer Chamber, delivered by Willes, J., pointed out that the difference of opinion in *Udell* v. *Atherton* (3) arose "not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—

(1) 6 M. & W. at p. 373; 9 L. J. (N.S.) Ex. at p. 302.

(2) 1 Salk. 289.

(3) 7 H. & N. 172; 30 L. J. (Ex.) 337.

(4) 16 C. B. 104; 24 L. J. (C.P.) 125.

(5) Law Rep. 2 Ex. at p. 265.

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a question which was settled as early as Lord Holt's time—but in applying that principle to the peculiar facts of the case . . . The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." That case decided that a banking company is liable for the fraudulent representation of its manager made in the course of conducting the business of the company. That decision was followed in *Swift* v. *Winterbotham* (1), and was not in any way impugned by *Swift* v. *Jewsbury* (2), see per Lord Coleridge. The effect of these cases and of the decision in *Western Bank of Scotland* v. *Addie* (3) was explained in *Mackay* v. *Commercial Bank of New Brunswick* (4), where the Court distinctly approved the general rule laid down in *Barwick* v. *English Joint Stock Bank.* (5) It is not necessary to shew that the defendants knew the false statements to be false. They employed others to make statements in their names without taking the trouble to ascertain what statements were made, and that is enough to make them liable, per Lord Cairns in *Reece River Silver Mining Co.* v. *Smith* (6): "I think it may be quite possible, as has been alleged, that the directors were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue." Nor is it necessary to shew that they received benefit: *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (7), though in the present case those of the directors who had advanced money did receive benefit by the repayment of their advances; and it was for that purpose among others that the false statements were made. Judged by the rule laid down by Lord Chelmsford in *Directors, &c., of Central Railway Company of Venezuela* v. *Kisch* (8) the defendants are liable. It is no answer to say that Stewart &

(1) Law Rep. 8 Q. B. 244.
(2) Law Rep. 9 Q. B. at p. 312.
(3) Law Rep. 1 H. L., Sc. 145.
(4) Law Rep. 5 P. C. at p. 412.
(5) Law Rep. 2 Ex. 259.
(6) Law Rep. 4 H. L. at p. 79.
(7) Law Rep. 7 C. P. 415.
(8) Law Rep. 2 H. L. at p. 113.

Lambe were agents of the company, for they were also agents of the defendants. The Court cannot enter judgment for the defendants without laying down the novel and startling doctrine that, if directors authorize brokers or accountants to issue a prospectus bearing the names of the directors, and the brokers publish a false and fraudulent prospectus, the directors may save themselves from all liability by taking care not to know what is in the prospectus.

Morgan Howard, Q.C., and *Romer*, for the defendant Barnett, were not heard.

Day, Q.C., and *Petheram*, for the defendant Baldwin, moved to enter judgment for him, and cited *Henderson* v. *Lacon* (1) and *Land Credit Company of Ireland* v. *Fermoy*. (2)

A. L. Smith, for the defendant Dymes, contended that the verdict was against the weight of the evidence.

Digby Seymour, Q.C., and *Lumley Smith*, for the defendant Bell, moved to enter judgment for him.

[The arguments urged for the defendants sufficiently appear in the judgment.]

Sir H. S. Giffard, S.G., in reply. The defendants were more than mere transmitters of authority to make statements; they had a personal interest in the thing to be done, and are as much liable as if they had made the false statements themselves: *Sands* v. *Child* (3), *Bennett* v. *Bayes* (4), and *Cullen* v. *Thomson*. (5)

Cur. adv. vult.

Nov. 23. The judgment of the Court (Kelly, C.B., Pollock and Huddleston, BB.) was read by

KELLY, C.B. The plaintiff in this action claims to recover from six defendants damages which he alleges he sustained by reason of certain false statements, contained in the prospectus of a company called "The Knightor, Treverbyn, and Resugga Hæmatite Iron Ore Mining Company, Limited," of which the defendants were directors. At the trial which took place before Huddleston, B., on the 27th of April, 1876, and eleven following days, a

(1) Law Rep. 5 Eq. 249, at. p. 261.
(2) Law Rep. 5 Ch. 763.
(3) 3 Lev. 351.
(4) 5 H. & N. 391; 29 L. J. (Ex.) 224.
(5) 4 Macq. H. L. 424.

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verdict and judgment passed against the defendant Furnival and for the defendant Siddens, and there having been no motion as to these two defendants, no further question arises.

As to the defendant Barnett the jury found a verdict in his favour, leave being reserved to move to enter a verdict for the plaintiff.

A verdict passed against the defendant Baldwin with leave to move, and against Dymes with no leave.

As to Bell the verdict was in his favour, with leave to the plaintiff to move.

Motions were made in accordance with the leave so reserved; also upon the ground that the verdict was against the weight of the evidence. The evidence at the trial was very lengthy, and a great many points were made before us upon the argument of the rules, but the following are the only facts which, it appears to us, are necessary to the proper understanding of the points of law which really arise.

The company, of which the defendants were directors, having been formed for the working of an iron mine in Cornwall, were compelled in January, 1873, to cease working for want of funds. Between that time and August, 1873, money was found and advanced to the company by the defendants Barnett, Baldwin, Furnival, and Dymes, and a small quantity of ore was raised. On the 1st of August, 1873, at an extraordinary general meeting of the company, held in order, inter alia, to provide for the existing deficit, and for working expenses, the directors were authorized by the meeting to issue debentures on such terms and for such amount as they in their discretion might think fit. In accordance with this resolution several meetings of the directors, at which the defendants or some of them were present, were held, and on the 29th of September, 1873, at the annual general meeting, the directors were again authorized by the meeting to issue debentures. Subsequently to this the directors met occasionally, and endeavoured and continued their endeavours to issue debentures, and at one of these meetings, held on the 8th of October, an agreement was entered into between the defendants Baldwin, Furnival, Dymes, and the company, that Baldwin and Furnival should make further advances for taking up certain bills, and that

the repayment of these sums and of the previous amounts advanced by the defendants should be made out of the proceeds of any debentures that might be issued.

This agreement was signed also by an agent of the defendant Barnett, he being absent from England. After this date debentures to a small amount were issued through Messrs. Marchant, brokers, who were employed by the company for that purpose, and on the 5th of November, at a meeting at which the defendants Baldwin, Bell, Dymes, and Furnival were present, the authority to Messrs. Marchant was rescinded, and it was resolved that the secretary be authorized "to employ brokers to place debentures to produce 10,000*l.* at a discount of 5 per cent., and a commission not exceeding 12 per cent." Under this authority the secretary, on behalf of the company, employed Messrs. Stewart & Lambe, who were brokers and public accountants, to place the debentures, and they, without any express authority, issued the prospectus complained of, which was prepared by their clerk, and contained the names of the defendants as directors. It set forth statements as to the condition and prospects of the company, some of which were found by the jury to be false. On the faith of the statements contained in this prospectus the plaintiff and others took debentures and paid for them. The money so obtained was paid into the bankers of the company, and a portion of it was applied by the directors, on behalf of the company, to the repayment of the advances made by the defendants, Barnett, Baldwin, Furnival, and Dymes, in accordance with the agreement of the 8th of October. The company continued to exist till January, 1875, when it was wound up.

The defendant Barnett left England for South America upon the 15th of August, 1873, and did not return until the spring of 1874. Before leaving he made a sketch for a prospectus, which he delivered to the secretary. This contained no statements but what were true. The repayments of the money advanced by him were made to his agent during his absence and without his knowledge.

The different circumstances of the case, as applicable to each of the defendants, were pointed out to the jury by the learned judge, and in the result they found as follows:—

As to the defendant Barnett, that none of the statements con-

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tained in the prospectus which were alleged to be false, were made by him personally or by his authority, but that the prospectus contained three statements of fact which were false to the knowledge of Stewart & Lambe; that the plaintiff was induced to part with his money by means of these statements; that the statements were within the scope of the authority of Stewart & Lambe as agents; that Barnett, when he left England, left authority to the directors to cause a prospectus to be issued in order to raise money on debentures, but not to make any false statements; that it was within the scope of their authority to issue a prospectus, but such only as the draft which Barnett had prepared, and which contained no false statements. They also found that Barnett received benefit from the fraud of Stewart & Lambe, but without knowledge of the fraud. The benefit referred to was in fact the repayment to him, out of the funds raised by the debentures, of the advances made by him to the company. Baron Huddleston reports that he sees no ground to be dissatisfied with the findings of the jury, and we agree with him. The question which next, however, arises is, taking the findings of the jury as conclusive in fact, what judgment ought to be entered; and in considering this it will be convenient to take the case of Barnett first, reserving the findings as to the other defendants and the observations which arise upon them to be dealt with separately.

It is clear that Barnett personally was guilty of no fraud; but it was contended for the plaintiff that he was liable for the wrongful acts of Stewart & Lambe, who for the purpose of issuing the prospectus must be considered as his agents, and in support of this proposition we were referred to the judgment of the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (1), where the Court, after citing many cases in which masters have been held liable for the tortious acts of their servants, say, "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

(1) Law Rep. 2 Ex. at p. 266.

This is an authority binding upon us; and were it not so, we should entirely agree with it; nor do we consider it, for the purposes of this case, in any way affected by what was said in the House of Lords in the case of *Western Bank of Scotland* v. *Addie* (1); but it remains to be seen whether it applies to the circumstances of the present case, and for this purpose it becomes necessary to look closely into the principle to which effect was given by it. Wherever there is fraud, those who personally are guilty of it are responsible, whatever may be their number, or the relation which they may bear to each other or to any by whom they may be employed, and no doctrine is more clear than that by which it is established that one who is guilty of fraud cannot shelter himself under the authority of his principal. Beyond this, moreover, it has long been settled law that where an agent is guilty of a fraud in the conduct of his master's business, the master, the employer whose agent he is, is answerable for it. This rule was the ground of Lord Holt's decision in *Hern* v. *Nichols* (2), and it has been acted upon from that time in numerous cases, many of which were discussed and considered in *Udell* v. *Atherton* (3), but in all, without exception, they have been cases in which the person committing the fraud has been the agent carrying on the recognized business of the principal and for his benefit, so that the contract in respect of which the fraud was committed was the contract of the principal. In *Barwick* v. *English Joint Stock Bank* (4) the fraudulent act on which the plaintiff's right was founded, viz., the giving of a false guarantee, was that of the defendants' manager, and was done by him in the usual course of his duty to his principals, the defendants, and with respect to a matter that was clearly the business of and transacted for the benefit of the defendants.

In the present case a different state of facts occurs; and the question arises, can it be truly affirmed that the individuals, who happen to be directors, concurring in the resolution appointing the brokers, were each and every of them principals in such a sense as to make them, though innocent, liable for the fraudulent acts of the brokers. If they were not, the rule would apply

(1) Law Rep. 1 H. L., Sc. 145.
(2) 1 Salk. 289.
(3) 7 H. & N. 172; 30 L. J. (Ex.) 337.
(4) Law Rep. 2 Ex. 259.

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which is stated by Lord Kenyon in *Stone* v. *Cartwright* (1) in an action for negligently working a mine adjoining the plaintiff's land. He says: "The action must either be brought against the hand committing the injury, or against the owner for whom the act was done." The matter is one of the greatest importance, and there are considerations of policy which may be urged on both sides; but when entering upon it we would say that we think it essential to act upon some clear principle of law, and that we agree with what was said by Bramwell, B., when delivering his judgment in the Exchequer Chamber in *Swift* v. *Jewsbury* (2), where he says: "No doubt there are cases in which a man may be charged with having committed a fraud when he has not committed it himself, but I think that that ought to be held in as few cases as possible."

Who, then, were the principals of the brokers when they issued the prospectus, and for whose benefit was it issued? The answer is, that the company, and the company alone, were the principals. The company were the borrowers of the money for which the debentures were issued, and the company and the company alone received the money which was in fact paid in to their bankers. The directors were merely the officers and agents of the company, as was also the secretary, in carrying into effect the resolution of the company and of the whole body of the shareholders that the debentures should be issued. No doubt the instructions to the brokers to obtain money on debentures must be taken to imply an authority to do all acts necessary or usually done for this purpose, and inter alia, the preparing, printing, and issuing of a prospectus; but in the doing of, or causing to be done, these acts, the directors were in no sense principals. The work was not their work, nor was it done for their benefit. It was the work of and done for the benefit of the company and its shareholders, who, as before observed, by resolution in general meeting had authorized and directed that debentures should be issued. There is no suggestion that the defendants were guilty of even negligence in the course which they adopted, so as to give application to the maxim, "Crassa negligentia dolo æquiparatur;" but even were there any negligence upon their part, it would appear to us more sound in

(1) 6 T. R. at p. 412. (2) Law Rep. 9 Q. B. at p. 315.

principle to hold that the individual directors, in the absence of personal fraud, were not liable, but that the company was liable; and that for any default on the part of the directors, the company would, as was pointed out by Lord Westbury in the *Mersey Docks Co.* v. *Gibbs* (1) have a remedy over against the defaulting directors.

In arriving at this conclusion we have not overlooked the fact that cases may occur in which the conduct of directors of a company may be such that, although they may apparently act as directors, what they direct to be done must be taken to be so in furtherance of their own interests alone, and so distinct from the business of the company as to make them in truth principals in respect of these particular acts, and as such liable for the acts of those whom they employ. In such cases, no doubt, directors might be unable to shelter themselves by asserting that they were mere agents for the company, and therefore not responsible; but this would be so, because such an assertion would be untrue in fact, their conduct having been illusory, and whilst they professed to act as agents they were, in truth, principals. This cannot be said in the present case. No act of the defendants can be pointed to as inconsistent with their duty to the company or as ultra vires.

The appointment of Messrs. Stewart & Lambe was one of a class of acts essential to the welfare of the company, and to carry out the immediate objects which the shareholders had in view. The advancing of the money by the directors, and the repayment of it out of the money obtained by the debentures, in the absence of any knowledge upon their parts of the false statements contained in the prospectus, does not in our judgment affect the question. Thus far, therefore, it appears to us the defendants are not liable. This leads us to another part of the case, which was much pressed upon us by the counsel for the plaintiff, and which involves an argument somewhat similar in character to that which we have already dealt with.

It was said that the finding of the jury, that Barnett received benefit from the fraud of Stewart & Lambe, makes him personally liable. We cannot accede to this proposition. In Barnett's case

(1) Law Rep. 1 H. L. at p. 127.

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it would probably be sufficient to say that his liability was negatived by the finding of the jury that he received the benefit without knowledge of the fraud; but we think the answer rests upon a broader basis. In the absence of personal fraud, the fact that the directors received an ultimate benefit, by the repayment to them of their advances out of the proceeds of the debentures, does not, in our judgment, affect their position, any more than the payment to any other creditors of debts contracted by the company and bonâ fide due to such creditors. A man may, indeed, adopt a fraudulent act done for his benefit, and so become liable for it as if he had authorized it beforehand; but the arrangement by which the directors were to be repaid out of the moneys obtained by the issue of the debentures, and the actual repayment, though in some sense consequent upon, have no necessary connection with, the fraudulent statements contained in the prospectus. The directors were perfectly justified in stipulating how they should be repaid, and the money which they received cannot for this purpose be identified with the fraud.

The only authority cited on behalf of the plaintiff which has any bearing on this part of the case is the decision of the Privy Council in *Mackay* v. *Commercial Bank of New Brunswick.* (1) The facts were, that an officer of the defendants, a banking corporation, whose duty it was to obtain the acceptance of bills of exchange, fraudulently and without the knowledge of the directors made a representation to the plaintiff, omitting a material fact, whereby the plaintiff was induced to accept a bill of exchange in which the bank was interested. The Judicial Committee held the bank liable for the fraud of their officer, saying (at p. 410): "Their Lordships regard it as settled law that a principal is answerable where he has received a benefit from the fraud of his agent acting within the scope of his authority." In support of this proposition their Lordships cite Lord Holt's decision in *Hern* v. *Nichols* (2), and a series of cases ending with *Udell* v. *Atherton* (3) and *Barwick* v. *English Joint Stock Bank* (4), in all of which the fraud was committed by an agent in the course of his duty

(1) Law Rep. 5 P. C. 394.
(2) 1 Salk. 289.
(3) 7 H. & N. 172; 30 L. J. (Ex.) 337.
(4) Law Rep. 2 Ex. 259.

towards and for the benefit of a principal in the usual course of business. The judgment, therefore, in this case does not extend the well-known rule of law, to which we have already alluded. It deals with the receipt of a benefit by the principal, as one of the pieces of evidence to shew that the agent was acting for him, and that therefore he is bound by his acts as principal, but it in no way tends to shew that a person who is not a principal, but an intervening agent, such as a director, is to be treated as a principal, when he is acting for the interests of his company, or that he is liable for the fraudulent acts of those he employs, because he may directly or indirectly receive an ultimate pecuniary benefit which is not the immediate and direct result of the fraud. As to the defendant Barnett, therefore, we think he is entitled to have a verdict and judgment entered in his favour. Hitherto we have dealt with the findings of the jury with respect to the defendant Barnett.

As to Baldwin, the jury found that the prospectus contained false statements by which the plaintiff was led to part with his money, and that these were made by Stewart & Lambe within the scope of their authority; that they were not made personally or by the authority of Baldwin, but that he received benefit. Upon these findings the learned judge directed the verdict to be entered for the plaintiff, giving leave to Baldwin to move.

The findings are practically the same as those against Barnett, except that the jury do not say that Baldwin received benefit without any knowledge of the fraud. We take this to mean that, although Baldwin was not aware of the false statements contained in the prospectus before it was issued, he became aware of them before he was repaid the money which he had advanced for the working of the mine. Having reference to the manner in which we have already dealt with this, we need only say that this finding does not shew that he was the principal of the brokers, and does not affect his claim to be repaid his advances by the company. And we think, consequently, that upon the leave reserved, judgment ought to be entered for Baldwin.

As to Bell, the jury found that there was no personal fraud, but that Stewart and Lambe were his agents in respect of the statements in the prospectus, and that he received no benefit. This

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finding, that the brokers were his agents, we have already observed, is contrary to the evidence. Judgment must, therefore, be entered for him, pursuant to the leave reserved.

As to Dymes, the jury found that he had personal knowledge of three of the false statements contained in the prospectus, and that they were made by him fraudulently. If this finding be right, the verdict against him should stand. Upon careful consideration, however, of the evidence relating to these three findings, we have come to the conclusion that, upon the evidence, the verdict of the jury cannot be supported, and that as regards the defendant Dymes there ought to be a new trial.

Solicitor for plaintiff: *Fox.*
Solicitors for Barnett & Dymes: *Trinders & Curtis Hayward.*
Solicitors for Baldwin: *Bailey, Shaw, Smith, & Bailey.*
Solicitors for Bell: *G. S. & H. Brandon.*

Nov. 26.

RAWLENCE AND OTHERS *v.* THE GUARDIANS OF THE POOR OF THE HURSLEY UNION.

Poor Law—Union Assessment—Valuation—27 & 28 *Vict. c.* 39, *s.* 4.

The valuation required by s. 4 of the Union Assessment Committee Amendment Act, 1864, is not a field valuation, but one giving the collective value of the hereditaments of each occupier.

THIS was a special case stated in an action by the plaintiffs, land surveyors and valuers, for work done for the defendants as assessment committee of the Hursley Union.

In March, 1875, it became necessary under 37 & 38 Vict. c. 54, and other Acts in force relating to the relief of the poor, that a new assessment and valuation list should be made of the Hursley Union, and the defendants employed the plaintiffs to make the same at an agreed scale of remuneration.

The plaintiffs made a valuation list which was in eight columns, in the first of which was the number on the ordnance map, and in the second the name of the occupier. The next three columns contained the name of the owner, the description of property (whether arable, pasture, &c.), and the name or situation of the

property. The sixth column contained the estimated extent of each parcel referred to. The seventh and eighth columns were headed "Gross estimated rental" and "Rateable value" respectively. Where a person occupied more parcels than one the estimated extent of all the parcels in his occupation was added up, and the total inserted in the sixth column at the end of the enumeration of such parcels, and in that case the gross estimated rental and the rateable value were carried out in the last two columns opposite to and in respect of these totals, and not against every item in the list.

The question for the opinion of the Court was, whether the valuation list, as judged by a sample set out in the schedule to the case and described above, was a sufficient valuation under the provisions of 27 & 28 Vict. c. 39, s. 4 (1), or whether the defendants were entitled to have a separate valuation of each field in the several occupations.

A. Charles, Q.C. (*Bromley* with him), for the plaintiffs. Under the Act the valuation is required for the purpose of enabling occupiers to be assessed, and it is sufficient for that purpose.

Lumley Smith, for the defendants. The valuers have not shewn the particulars of the hereditaments comprised in the valuation. It is very desirable to have the values of the different fields set out to prevent the necessity for re-valuing in case of changes in the occupation.

KELLY, C.B. I think the valuation is made out in conformity with the Act, though it has, in my opinion, gone into unnecessary detail in setting out the particulars of the different fields. The object of the valuation is not to obtain the value of each separate hereditament numbered in the ordnance map, but to afford a convenient means by which the union assessment committee can

(1) The Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 4, is as follows:—"Where a valuer is appointed by the assessment committee he shall make his valuation in writing, shewing the particulars of the several hereditaments comprised therein, and the amounts at which he has valued the same respectively, and shall sign such valuation, which shall be open to inspection in like manner and with the same incidents with respect to the taking of copies or extracts as the minute books of the committee."

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assess each occupier. No doubt it is convenient for the valuers to go through each field as marked on the ordnance map, but for the purposes of the Act it is sufficient if they give the rateable value of the hereditaments of each occupier, which can be done without a field valuation. The plaintiffs are, therefore, entitled to judgment.

CLEASBY, B., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Co., for C. Watman, Salisbury.*

Solicitors for defendants: *Clarke, Rawlins, & Clarke.*

Dec. 6.

HADGETT *v.* THE COMMISSIONERS OF INLAND REVENUE.

Stamp Duty—Order of Charity Commissioners—Appointment of Trustees and Vesting of Property—The Stamp Act, 1870 (33 & 34 *Vict. c.* 97) *ss.* 8, 78.

An order of charity commissioners, by which new trustees of a charity are appointed and the property of the charity vested in them, is chargeable, under s. 8 of the Stamp Act, 1870, with duty in respect both of the appointment and of the vesting order, and does not come within the proviso to s. 78 as a conveyance or transfer made for effectuating the appointment of a new trustee.

CASE STATED by the Commissioners of Inland Revenue, pursuant to the 19th section of the Stamp Act, 1870, on appeal against an assessment, made by the commissioners, of the amount of the stamp duty chargeable on an order of the Board of Charity Commissioners for England and Wales for the discharge and appointment of trustees of a Wesleyan Methodist Chapel.

The order, after reciting that the usual preliminary steps had been taken, and that there was a doubt as to the validity of the appointment of the existing trustees, removed and discharged three persons from being trustees of the charity, and appointed the remainder of the former trustees and eleven other persons to be trustees. The order then continued:—"And the said board do hereby further order that the aforesaid chapel, with the appurtenances comprised in the said above-mentioned indentures of the 14th and 15th days of June, 1833, and all term and estate therein, and all other lands and hereditaments (if any) held in

trust for the benefit or purposes of the said charity and not being of copyhold tenure, with the appurtenances, do vest in the said persons who by virtue hereof are constituted the trustees of the said charity, their heirs, executors, administrators and assigns, according to the legal nature of the same premises, upon and for the subsisting trusts thereof." The Commissioners of Inland Revenue were of opinion that the instrument was chargeable under the provisions of "the Stamp Act, 1870," with the stamp duty of 10*s.* as an appointment of new trustees, and also with the further stamp duty of 10*s.* as a conveyance or transfer of property, and assessed the duty at the sum of 1*l.*

The question to be decided by the Court was with what amount of stamp duty the instrument was chargeable?

The stat. 33 & 34 Vict. c. 97, by s. 3 grants the duties specified in a schedule. By s. 8: "Except where express provision to the contrary is made by this or any other Act—an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters." By s. 78, "every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is chargeable with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 10*s.*"

The schedule contains the following "appointment of a new trustee and appointment in execution of a power of any property, or of any use, share, or interest in any property, by any instrument not being a will, 10*s.*, and see s. 78."

"Conveyance or transfer of any kind not hereinbefore described, 10*s.*, and see s. 78."

Herschell, Q.C. (*Sim* with him), for the appellant, contended that under the proviso to the 78th section the order was chargeable with a 10*s.* stamp only.

Sir Hardinge S. Giffard, S.G. (*Dicey* with him), contended that under the 8th section the order related both to the appointment of

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trustees and to the conveyance of property, and was chargeable with duty in respect of each of such matters.

KELLY, C.B. The language of the statute is very clear; and although there may be cases in which the mere appointment of trustees at once transfers the trust property, it is not so here. Under the Charitable Trusts Acts (1) empowering commissioners to deal with this subject whether by one or two instruments, they may appoint a trustee, and they may also, and in addition to the appointment of a trustee make a vesting order (whether the order is part of the same instrument or not is not material) vesting the property, and transferring it into the hands of the new trustee so appointed. The 8th section of the Stamp Act, 1870, says: "An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters." Under the schedule an appointment of a trustee is subject to a duty of 10*s.*; but an order of commissioners vesting any property whatsoever in another, is also subject to a duty of 10*s.* Here are two distinct things, appointment and vesting, each of which involves a stamp, and that is exactly applicable to the present case. The only part of the statute which seems to operate against this view is the 78th section, which provides: "That a conveyance or transfer made for effectuating the appointment of a new trustee" is not to be charged with any higher duty than 10*s.* So that so much of this instrument as relates to the effectuating the appointment of a new trustee is not to be charged with more than 10*s.* Then there is also a conveyance or order vesting the property in the trustees; that is another matter altogether. It is clearly additional to and irrespective of, though connected, with the earlier provision in the order, namely, the appointment of the new trustee.

CLEASBY and POLLOCK, BB., concurred.

Judgment for the Crown.

Solicitors for appellant: *Gregory, Rowcliffes, & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

(1) See 23 & 24 Vict. c. 136, s. 2.

[IN THE COURT OF APPEAL.]

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Nov. 28.

ANGELL *v.* BADDELEY.

Sheriff—Side-bar Rule to return Writ of fi. fa.—Interpleader.

On a levy by a sheriff under a writ of fi. fa. three persons claimed different portions of the goods. The sheriff interpleaded, and three separate orders were made directing that, on payment of certain distinct sums into court by the claimants within seven days, the sheriff should withdraw and issues should be tried; in default of payment he should sell and pay the proceeds into court. One of the claimants paid money into court, and the interpleader issue in his case was set down for trial. The other two abandoned their claims, but the sheriff withdrew from possession:—

Held, affirming the decision of the Exchequer Division, that the execution creditor, pending an interpleader issue, had no right to the immediate return of the writ.

THE plaintiff on the 31st of August, 1877, obtained judgment against the defendant for 38*l.*, and thereupon issued a writ of fieri facias directed to the sheriff of Middlesex to levy an execution on the defendant's furniture at her house, 23, Charlotte Street. The sheriff levied upon the goods, to which three persons respectively laid claim. One Ramus claimed certain of the goods under a bill of sale; one Edward Baddeley, a relative of the defendant, claimed certain of the goods on the top floor of the house as his own property; and one E. A. Hunt claimed the residue of the goods in the drawing-room floor of the house also as his own property. The sheriff thereupon issued an interpleader summons, and at the hearing the learned judge having been informed that the value of the goods seized amounted to 105*l.* made three interpleader orders, and directed that in Ramus' case upon payment of 45*l.* into court, within seven days of the date of the order, the sheriff should withdraw from possession of the goods, but unless the money was paid into court within that time that the sheriff should proceed to sell the goods, and he directed that an interpleader issue should be tried between the claimant Ramus and the plaintiff. Similar orders were made in the two other cases upon the claimants, Baddeley and Hunt respectively paying into court the sums of 40*l.* and 20*l.* Ramus paid 45*l.* into court, and an interpleader

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issue was settled and set down for trial. Baddeley and Hunt did not make the payments ordered, and eventually they abandoned their claims; and with respect to the goods claimed as belonging to them the sheriff, instead of selling as directed by the orders, withdrew from possession. The plaintiff then obtained the usual side-bar rule calling upon the sheriff to return the writ of fieri facias. A judge at chambers, on a summons taken out by the sheriff, set aside the rule. The Exchequer Division affirmed the judge's decision.

The plaintiff appealed.

Lyon, for the plaintiff. The side-bar rule was set aside upon the ground that pending an interpleader issue the sheriff cannot be compelled to return the writ of fi. fa. There is no authority for this proposition. But assuming it to be law, it cannot apply where there has been only a partial compliance with the interpleader orders. It is true that in Ramus' case an interpleader issue is pending, but the two other claimants have failed to comply with the orders, and as against them the execution creditor is entitled to have the goods sold, and the money paid to him. The sheriff has withdrawn from possession, and the execution creditor is entitled to a return of the writ in order, if so advised, that he may proceed against the sheriff. He is not bound to wait until the interpleader issue between Ramus and himself is tried, for before that occurs the sheriff might be out of office and the remedy against him barred by lapse of time, or the sheriff might die, in either of which cases the execution creditor would be unable to obtain redress. But the execution creditor is entitled as a right to rule the sheriff to return the writ. This is distinctly laid down in Watson on Sheriff, p. 81. "The party whose writ it is may rule the sheriff to return it at any time." The sheriff, as a general rule, is bound to return the writ on request, and he can be compelled by a side-bar rule; no action will lie against the sheriff who has not been ruled: *Morland* v. *Leigh*. (1) The same law is laid down in Lush's Practice, p. 736. The first proceeding in order to fix the sheriff is to compel a return of the writ, which is done both in vacation and in term by a side-bar rule.

(1) 1 Stark, 388.

In Chitty's Forms, p. 327, a precedent of a return of fieri feci as to part, with an interpleader order as to the residue, is given. There is no reason why a return somewhat similar could not be made by the sheriff if he had obeyed the order which was made at his own instance.

Cock, for the sheriff. Until the interpleader issue is decided the sheriff ought not to be called upon to make any return to the writ, for if the execution creditor succeeds in the issue he will have his debt satisfied out of the money that is paid into court. The sheriff is not bound to seize any particular goods, he may make the debt out of any goods of the debtor he pleases. He has a right to say also certain goods are the debtor's goods and others are not; provided that there are sufficient goods to satisfy the execution creditor's debt he has no cause of complaint—enough money has been paid into court to satisfy his debt. If the creditor should be unable to establish his claim under the interpleader issue, then the sheriff would be liable if he has made any default, but in the present stage of the proceedings it is premature to rule the sheriff to return the writ; it might be a useless proceeding. Indeed he cannot make any return at present—the sheriff cannot return fieri feci, he cannot return nulla bona, nor can he make any valid return to the writ—any return that he now makes would be bad. At the proper time the sheriff will be prepared to make a return. The practice is not to require the sheriff to return the writ pending an interpleader issue.

Lyon, in reply. If the sheriff is unable to make a good return to the writ the difficulty is entirely of his own creating. If he had obeyed the orders, and on the two other claimants making default in the payment of money into court, he had sold the goods, there would have been no difficulty. He first seeks the protection of the Court under an interpleader order, and then he disobeys it, he must therefore take the consequences. If the sheriff has any valid excuse for not executing a writ, he may state such matter of excuse in his return as that the defendant is privileged: Watson on Sheriff, p. 95. It is the sheriff's own fault if he cannot make a good return to the writ, and he ought not to be allowed to take advantage of his own wrong, and be excused from returning the writ.

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BRAMWELL, L.J. I am of opinion that the appeal should be dismissed. If the execution creditor was entitled, as a matter of right, to a side-bar rule calling on the sheriff to return the writ, then I think the best course would have been for the judge to have enlarged the time for making the return until after the interpleader issue had been tried. It seems to me, however, that the execution creditor was not entitled as a matter of right to the rule, and the judge at chambers had a discretion to set the rule aside if it had been improperly issued. The facts are that certain goods are seized as the goods of the debtor, whereupon three claimants allege a title to different portions of the goods, and three different interpleader orders are made, in the usual form to the effect that, if the claimant within a certain time pays into court a certain sum, the sheriff do withdraw from possession; but if default be made in the payment of the money that the sheriff sell the goods, and that an interpleader issue be tried between the claimant and the execution creditor as to the title to the goods. Now, I think the sheriff misinterpreted the order; he seemed to consider that if enough was paid into court under one order to satisfy the plaintiff's debt, he was at liberty to withdraw from possession as to the goods claimed by the other persons. He, however, has withdrawn from possession in all the cases. Now, if the claimant who has paid money into court is entitled to succeed in his interpleader issue, the execution creditor has a right to demand from the sheriff the proceeds of the goods which he had been ordered to sell: and if default was made by the other claimants in the payment of the money into court, and if the sheriff can give no satisfactory answer to the plaintiff, he might then be required to return the writ, and if he returned nulla bona he would be liable for not having kept the goods, or if he returned fieri feci then he would be bound to pay the money to the plaintiff. Therefore, in the event of Ramus succeeding, the plaintiff will have a good remedy against the sheriff; if Ramus fails, the money he has paid into court is sufficient to satisfy the plaintiff's claim: therefore, whether Ramus succeeds or not the plaintiff has a remedy. But, it is said if Ramus succeeds against the plaintiff, instead of having the money in court under the other interpleader orders, and a certain immediate remedy, the plaintiff will have merely a right of action

against the sheriff which is not so advantageous to him. To that objection it may be answered that if the plaintiff was likely to be prejudiced by the act of the sheriff, he should go to the Court or a judge and claim the benefit of the interpleader orders, and call upon the sheriff to sell the goods.

It seems to me, therefore, that the plaintiff is adequately protected, and that the side-bar rule ought not to have been obtained. I think that this appeal ought to be dismissed, and that the judge at chambers and the Exchequer Division were right.

BRETT, L.J. I am not prepared to say that the sheriff acted rightly in withdrawing from possession, or that he had any discretion in the matter. The sheriff had a discretion before he obtained the interpleader order, but after he had applied for an order in respect of each claimant, and had obtained a protection in certain terms, he was bound to obey the order. I am inclined to think that the sheriff might be attached for not obeying the order made at his own instance, but it is not necessary to decide that point. The only ground on which I can concur is that Mr. Lyon has not made out that pending the interpleader order the plaintiff had a right to an immediate return to the writ of fieri facias, and on this ground I think that the judge at chambers had a discretion whether he would set aside the side-bar rule or not. The test whether the right is absolute or not is to see whether the return would be of any use to the plaintiff. I cannot see that any return the sheriff can make to the writ pending the interpleader issue can be of any use to the plaintiff; the return would be futile, therefore the judge had a discretion, and this appeal should be dismissed.

COTTON, L.J. There must be, pending an interpleader issue, a discretion in the judge whether the sheriff shall be bound to make a return to the writ; and in the absence of any absolute and immediate right to call for a return, the judge may or may not order the side-bar rule to be set aside. The plaintiff can ask for a return to the writ at the proper time. I cannot see how the plaintiff can be benefited by a present return. He cannot bring his action until after the interpleader issue is decided. I

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am not inclined to say that the sheriff has any right to withdraw from possession and give up the goods; but it is not necessary to decide that point. I think the decision of the Exchequer Division was right, and this appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Angell.*
Solicitor for sheriff: *Maynard.*

Nov. 28.

THE BENFIELDSIDE LOCAL BOARD *v.* THE CONSETT IRON COMPANY, LIMITED.

Mine—Right to Support of Surface—Inclosure Act—Reservation to Lord of Manor.

Commissioners, acting under the powers conferred on them by a local inclosure Act for inclosing certain commons, set out public highways over the land, and directed that they should be maintained by the inhabitants and occupiers of the township in which they were situated, and that it should be lawful for all persons to use the same. The Act reserved to the lord of the manor, his successors and assigns, in the widest terms, all rights belonging to the manor, and all mines, minerals, and quarries under the commons, with power to do every act necessary for the draining, winning, and working such mines, minerals, and quarries as fully and freely as he or they could have had, held, used, or enjoyed the same in case the Act had not been made, without paying any damages or making any satisfaction for so doing. The assignees of the lord of the manor worked the mines so as to injure one of the roads set out by the commissioners. In an action against them by the local board, on whom the duty of repairing the road fell, to recover the expense of doing so:—

Held, that the reservation to the lord of the manor must be taken to be subject to the public right created by the statute, and did not protect the defendants from liability.

CASE stated in an action brought by the Benfieldside Local Board to recover damages for injuries done to certain highways within their district by the defendants. The following are the material parts of the case, the paragraphs being numbered as in the original.

1. In the year 1773 an inclosure Act, known as the Lanchester Common Division Act, was passed for the purpose of dividing and inclosing certain moors, commons, or tracts of waste land within the parish and manor of Lanchester, in the county palatine of Durham, containing by estimation 20,000 acres or thereabouts.

2. The preamble recited that the Bishop of Durham, in right of his church and see of Durham, was lord of the manor of Lanchester aforesaid, and as such seized of and entitled to the soil of and royalties within and under the moors, or commons, or tracts of waste lands; and certain commissioners were appointed for the purpose of making the division.

3. The Act enacted that the commissioners should "assign, set out, and appoint such public highways and roads in, through, and over the residue or more improveable parts of the said moors or commons intended to be divided and inclosed, as they shall think proper and convenient (which highways and roads shall not be less than sixty feet of assize in breadth between the ditches), and shall also assign, set out, and appoint proper parts of such residue or more improveable parts of the said moors or commons for common quarries, common watering places for cattle, and common wells, and shall also assign and set out such common public and private horse and other roads, ways, passages, and bridges, and such gates, styles, hedges, sewers, drains, and watercourses in, over, upon, and through the said lands and grounds, so to be inclosed, as they shall see proper, useful, and convenient."

4. It further enacted that the commissioners might order all public highways, roads, bridges, and drains by this Act appointed to be set out to be well and sufficiently made, &c., and might order how the expenses of making and keeping them in repair should be borne, and it continued, "after the making of the same award, and of such highways and roads and other ways, it shall not be lawful for any person or persons to make or use any roads or ways, either public, common, or private, in, over, or through the said allotments, or any of them, or any part thereof (other than and except the said lord bishop and his successors, and his and their lessees and assignees as hereinafter is mentioned), either on foot or on horseback, or with horses, cattle, carts, or carriages, or otherwise, other than such as shall be so set out and appointed by the said commissioners as aforesaid, and that all former roads and ways which shall be set out and appointed as roads and ways through the said intended inclosures shall be deemed part of the lands to be inclosed, and shall be divided and allotted, held and enjoyed, as part of such lands accordingly."

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5. It further enacted "that nothing in this Act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said Lord Bishop of Durham as lord of the said manor of Lanchester, or his successors, or his or their lessees or assigns, or any of them, of, in, and to the seigniory and royalties incident and belonging to the said manor, but the lord of the said manor for the time being, and his lessee and lessees and assigns, shall and may from time to time, and at all times for ever hereafter, hold and enjoy all courts, perquisites, and profits of courts, rents, services, waifs, estrays, and all royalties, jurisdictions, matters, and things whatsoever to the said manor or to the lord thereof for the time being incident, belonging, or appertaining, other than and except such common right as could or might be claimed by him or them as owner or owners of the soil and inheritance of the said moors or commons, in as full, ample, and beneficial a manner to all intents or purposes as he or they could or might have held or enjoyed the same if this Act had not been made; and also that the said Lord Bishop of Durham, and his successors, and his and their lessee and lessees and assigns, shall and may from time to time, and at all times hereafter, have, hold, work, and enjoy all mines, minerals, and quarries of what nature or kind soever lying and being within or under the said moors or commons intended to be divided and allotted as aforesaid, together with all convenient and necessary ways and wayleaves in, through, over, and along the said moors or commons, or any part thereof, not only before, but also at all times after the same shall be divided in pursuance and by virtue of this Act, and full and free liberty at all times hereafter of making, laying, repairing, and using any new road or roads, waggon way or waggon ways, or any other way or ways whatsoever in, through, over, and along the same or any part thereof, and for that purpose to take away and remove any hedges, fences, trees, partitions, or other obstructions which shall be made for dividing the said moors or commons or otherwise, or which shall be standing or growing thereon, and to do every other act which shall be necessary to be done for the purpose aforesaid, and of searching for, draining, winning, and working the said mines and quarries, and also of all other mines and quarries belonging to the see and bishopric of Durham,

wheresoever the same are or be, by any ways or means now in use or hereafter to be invented, and also of leading and carrying away all and every the coals, lead, minerals, stones, the manure bred at the said mines, and other things to be gotten thereout, or out of any other lands or grounds whatsoever, and also of leading and carrying all iron, wood, materials, and things unto the said mines and quarries needful, necessary, or proper for the draining, winning, working, and use of the same respectively, and of making pit shafts, pit rooms, heap rooms, drifts, levels, watercourses, and drains, and of using as heretofore all those buildings, workshops for smiths and wrights, hay-yards and raff-yards, already erected for the purpose of working the coal mines under the said moors or commons, and of erecting and using fire engines and other engines, and other buildings, workshops, hay-yards and raff-yards, pit rooms and heap rooms, and all and every other necessary and convenient works, buildings, erections, liberties, powers, and authorities either now in use or hereafter to be invented; together, also, with full and free liberty, power, and authority from time to time, and at all times, at his and their will and pleasure, to remove and take away from off the said moors or commons, convert to their own use or uses all and every the rails, sleepers, iron, timber, and other materials of the said waggon ways and other ways, pits, shafts, fire engines and other engines, shops and other works, buildings, and erections whatsoever already laid, placed, built, or erected, or hereafter to be laid, placed, built, or erected as aforesaid, as fully and freely as he or they might or could have had, held, used, and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing.

"Provided always and be it further enacted that in the leading or carrying away any of the coals, stone, rubbish, or other things to be gotten out of any coal pit or pits wrought or used for land-sale only, and which shall and may be led or carried away by any carts or wains or other carriages than coal waggons, and in the leading or carrying away any materials, utensils, or things to or from such pit or pits, the nearest and most direct roads, ways, or courses in or through the allotments to be set out as aforesaid, shall be used to and from such pit or pits into and from the next

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adjoining public or common highways, and no such roads, ways, or courses shall exceed sixty feet in breadth, and as little damage and spoil of ground as may be shall be done or made in or to such allotments by the winning or working of such land-sale pit or pits or passing or repassing of such carts, wains, or carriages."

6. In order to provide compensation for surface damage to the allotments by the working of the mines, minerals, and quarries, the commissioners were empowered to allot to the justices of Durham any quantity of the moor not exceeding 500 acres, and not less than 300 acres in one entire plot or parcel, to be held and enjoyed by them upon the several trusts, and for the intents and purposes thereinafter mentioned; and in reference thereto the Act contains a provision that when any person shall suffer any loss or damage in his allotment by the using any of the powers or liberties thereby reserved to the lord bishop and his successors, and his lessee and lessees and assigns as aforesaid, such person so damnified upon making such complaints shall receive such satisfaction for such damage as thereinafter is directed in that behalf.

7. After charging the rents to be derived from this last-mentioned allotment or parcel, with the expenses of management, it is enacted that the residue shall be disposed of as follows: Upon complaint of any person damnified the justices of the peace at their said sessions shall examine and inquire into such complaint in a summary way, and finally settle and determine the damages sustained by the person so complaining, and order their steward upon demand to pay the same, together with reasonable charges on account of making and prosecuting such complaint unto the person so complaining, and the residue (if any) shall be laid out in the repairing, amending, and supporting the public and common highways, causeways, and other ways set out by virtue of this Act in such manner as the justices shall direct. "And whereas it may happen in some years that the clear rents and profits of the said last-mentioned allotment or parcel of ground may not be sufficient to satisfy and pay all the damages and charges which may be so sustained, and so settled, ascertained, and determined by the said justices as aforesaid, Be it therefore enacted that in every such case so happening the deficiency after such application of the said rents and profits as aforesaid shall be

paid and borne by the owners or occupiers of all the several allotments of the said moors or commons (save and except the said allotments so to be vested in the justices but including that or those of the persons so damnified and making complaint) according to the respective yearly rents or values of the same as they shall respectively be rated or charged for or towards the relief of the poor of the several parishes, townships, or places wherein they shall respectively lie in such shares and manner as the justices shall direct."

Then followed a power to order a distress, and a provision that an occupier who had paid damages might deduct them from his rent.

8. In 1779, before the commissioners made their award, a further Act was passed, by which the commissioners were authorized to allot the plot free of all rents, tithes, and only subject to the payment of the yearly rent of 30*l*. It was further enacted that such yearly rent should be paid, applied, and disposed of under the direction of the justices in the same manner and form, upon the like complaints, inquiries and proofs, and for the same uses, ends and purposes, as the rents and profits of the plot in case the same had been let by the justices according to the first-mentioned Act.

9. The commissioners by their award, in pursuance of these provisions, allotted the allotment of 300 acres, subject to the perpetual rent-charge of 30*l*., which sum has ever since been paid to the treasurer of the county by the owners for the time being of the allotment; but it is quite insufficient to meet all the claims for compensation upon it.

10. The commissioners by their general award, made in accordance with the foregoing provisions, set out among other roads a public highway sixty feet in breadth in, through, and over the more improveable parts of the moors and commons, called the Shotley Bridge and Durham Road, and also another public highway sixty feet in breadth in, through, and over part of the moors and commons, called the Shotley Bridge and Newcastle Road, and thereby directed that the same should be (as to the portions within the township of Benfieldside) for ever thereafter maintained and kept in repair by all and every the inhabitants and occupiers

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for the time being of lands, tenements, woods, tithes, and hereditaments within the township of Benfieldside, in like manner as the inhabitants and occupiers were by law liable to repair other highways within the township.

11. The commissioners by their general award further ordered and directed that all and every the before mentioned public highways by them set out and appointed, as well those of the breadth of sixty feet as also the public roads or ways which are less than sixty feet in breadth, should at all times thereafter be and continue of the several and respective breadths hereinbefore mentioned and prescribed. And that it should and might be lawful to and for all persons whomsoever at all times thereafter to go, pass and re-pass on foot and on horseback, and with horses, coaches, carts, and carriages. And also to lead and drive all and all manner of cattle and other things in, through, over, and along the said respective public highways and roads at their free will and pleasure.

12. Under a large portion of the 20,000 acres so allotted, including the part of the land so allotted near to and under the highways, there were and are valuable seams of coal, which, as before stated, were at the time of the passing of the Act of 1773 the property of the bishops of Durham, and were specially reserved to them under the clauses of the Act above set out. These coal seams now belong to the Ecclesiastical Commissioners, who are now lords of the manor, with the same powers of working and leasing the coal seams and minerals as the bishops of Durham previously enjoyed. The coal seams have been leased by them to and are worked by the Consett Iron Company, the present defendants.

13. In consequence of the mining operations of the defendants, which have been carried on near to and underneath the two highways so set out as above-mentioned, portions of these roads near to Blackfine and Shotley Bridge Railway station, and within the township of Benfieldside, sank below their original level and became, until repaired, dangerous to travel over.

14. The Benfieldside Local Board, in whom the roads within the township of Benfieldside are now vested, and whose duty it is to repair them, have been put to an expense of about 30*l.* up to the present time in filling in the cracks and falls caused by the

shrinking of the surface of those roads in consequence of such mining operations, and in keeping such roads level and in good repair.

15. The defendants admit the damage done to the roads, but they refuse to reimburse the local board the expenses they have so incurred, on the ground that under the mining powers and reservations contained in the Lanchester Inclosure Act of 1773, they are entitled to work the whole of the coal without being under any obligation to leave any support for the surface, and without making any compensation for injury thereto.

16. At the time of the passing of the Lanchester Inclosure Act of 1773 the customary mode of working coal in the county of Durham was by leaving ribs or pillars of coal to support the surface, and such continued to be the practice till shortly after the passing of the Act, since which time it has become customary to take the whole of the coal where the owner of the coal is not liable for surface damage in working such coal, it being usual to begin by leaving pillars of coal to support the roof, which pillars in working back again are removed. Some of the seams of coal under and near to the roads in question are on the outcrop, and so near the surface that the coal could not be worked, even by leaving pillars of coal, without probably causing some, although slight, damage to the roads.

17. It is admitted that the coal has been and is worked by the defendants in the usual manner, according to the present mode of working coal, when the object is to extract the whole of the coal without regard to the damage done to the surface, but that the effect of such working has been and is to damage the highways, and to cause them to be out of repair, and if such mode of working is pursued under the roads, that many parts thereof will become, where they are near the outcrop, quite impassable.

18. The owners and lessees of the coal contend that the Act grants to them right at all times, after the passing of the Act, to hold, work, and enjoy all mines, minerals, and quarries lying under the moors and commons, and full and free liberty at all times thereafter of making any new road or roads or waggon way, over and along the same, with power to remove the fences made for dividing the moors, and to do every act necessary for

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searching for and winning and working the mines by any ways or means then in use, or thereafter to be invented, and that without paying any damages or making any satisfaction for so doing. They also rely on the fact that the award made in pursuance of the Act points out fully the mode in which all roads set out under the Act shall be maintained. And, moreover, that the Act itself provides a special fund, out of which any damages to be caused by working the mines shall be paid, and in the event of that source proving insufficient, it enacts that the deficiency shall be made good by the proprietors of all the allotments.

They also contend that if the improved method of mining, under which the whole of the coal came to be removed, was not put in practice until after the date of the Act, yet such altered mode of working is nothing more than is permitted by the Act, in giving power to work the mines without limitation of any kind, and in describing the powers and authorities conferred as being those either then in use or thereafter to be invented.

19. The Benfieldside Local Board, on the other hand, contend that the roads referred to being set out under the authority of the Act as public highways, every other clause in the Act must be construed as subject to the paramount right of the public to have the highways supported by all or so much of the coal as is necessary for their support and kept free from pitfalls; also that from the mode of working coal at the time the Act was passed, it was not contemplated that any serious injury would follow from the working of the coal such as now results from the entire removal of the coal, and that the compensation clauses have consequently relation to surface injuries by acts done on the surface, but that in any view of the case the compensation clauses do not affect the present question, as those clauses were only intended to cover damage done to the allottees in their allotments under the powers reserved to the owners of the minerals and their lessees.

20. On these facts the question for the opinion of the Court is —On the proper construction of the Lanchester Inclosure Act, are the owners of the minerals, and their lessees, entitled to work the coal, and so as to withdraw the natural support of the roads set out under the Act, and that without making any compensation for injury thereby caused to such roads?

If the Court should be of opinion that they are not so entitled, the judgment in this action shall be entered for the plaintiffs for 30*l.* damages and costs, otherwise judgment shall be entered for the defendants with costs.

Cowie (*J. D. Fitzgerald* with him), for the plaintiffs. This is not the case of an interference with a private right as in *Blackett* v. *Bradley* (1), but the question is what is to be the effect of the Act when a public and a private right, both created by it, are in conflict. [He also cited *Roberts* v. *Haines* (2), *Duke of Buccleuch* v. *Wakefield* (3), and *Hext* v. *Gill.* (4)]

Herschell, Q.C. (*Crompton* with him), for the defendants. The Act not only says that the lord of the manor is not to be liable for damage done, but it points out how such damage is to be compensated. It is admitted that such a claim as the present must be founded on express words in the Act, but there is no ambiguity whatever in this case. [He cited *Buchanan* v. *Andrew* (5) and *Aspden* v. *Seddon.* (6)]

KELLY, C.B. I think the plaintiffs entitled to the judgment of the Court. The question arises under an Inclosure Act of 1773 for inclosing Lanchester Common. Under the provisions of that Act certain public roads have been constructed, and when we look to the case we find in paragraph 3 the power under which this is done, and we find by paragraph 4 that these roads are in lieu of the former, which are extinguished as highways and after the making of the new ones can no longer be used. As regards the public, the commoners, and all persons interested, it was the duty of the commissioners to set out these public roads, and that having been done, it appears that mines have been since worked in such a way as to damage these roads, and indeed to threaten their total destruction. The question is whether the act of the owner of the mines, in working them so as to damage the highways, is lawful. It is contended that under the express words of the Act of Parliament the owner is entitled to work the mines without leaving any support; and that so the roads may become

(1) 1 B. & S. 940; 31 L. J. (Q.B.) 65.
(2) 6 E. & B. 643; 25 L. J. (Q.B.) 353.
(3) Law Rep. 4 H. L. 377.
(4) Law Rep. 7 Ch. 699.
(5) Law Rep. 2 H. L., Sc. 286.
(6) Law Rep. 10 Ch. 394.

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dangerous without his incurring any liability. That is the claim, and it is necessary to inquire on what it is founded. The provisions of the Act set out in paragraph 5 preserve to the lord of the manor the right, not only to enjoy all mines, minerals, and quarries, with the necessary access to them, but to do every act necessary for the purpose of winning the minerals: he may search for them, carry them away, and is to have the use of the buildings necessary for that purpose, and the pit-rooms and heap-rooms, and in short everything that is requisite, "as fully as he might have had, held, used, and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing."

If we take the whole of this clause, it is plain that if the owner of the mines has a right so to work them as to take away the support, he must be equally entitled (for either right would arise under this same clause) to erect a workshop on the highway and thus prevent its user. The plain answer to the defendant's contention is, that whatever power was reserved of working these mines without making satisfaction, that power must be read with the other express provisions of the Act; and if the Act provides by one clause a highway for all the Queen's subjects, it cannot be read as intending by another clause to sanction the destruction of that highway. Reading the different provisions of the Act together, the effect of that which requires the commissioners to set out highways is to put an end to any power which would otherwise be conferred by the statute, but which is inconsistent with the creation and preservation of these highways. Any act, therefore, the effect of which is to interfere with the preservation of the highways for their lawful use is not within the reservation, and unlawful. The authorities which have been cited for the defendants, if we give to them, as we are bound to do, their full effect, are not applicable to the state of things existing in this case.

CLEASBY, B. It is unnecessary to say anything on the many points raised on the cases cited, as in this case the question is different from any before considered. We have here an enactment that the commissioners are to set out roads, and it appears that in accordance with the provisions of the Act they did so. As soon

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as this was done it is clear the public had a right to use the road, and to pass over it without hindrance or danger. This is a general right in respect of all highways which is most carefully preserved by the legislature. How can it be said that an Act of Parliament which appoints a public road has at the same time legalised a public nuisance by the stopping up of that very road? The same question might arise in other ways on this Act, as, for instance, in respect of the common wells which the commissioners are to set out. It certainly would be strange to find that any person could take away from the public the supply of water which it was intended to give by the statute. I should say it would be impossible to put any construction on this Act which would lead to such a result, because every private reservation must be read as subject to the public provisions, as if it had been expressed in so many words that that should be so.

I may say that I am not satisfied that the words in the 5th paragraph, "all mines, minerals, and quarries of what nature or kind soever lying and being within or under the said moors or commons intended to be divided and allotted," would not exclude the mines under the roads. But however that may be, I think it clear on the other part of the case that the defendants had no right to interfere with the user of the highway, and our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Rogerson & Ford.*
Solicitors for defendants: *Torr & Co.*

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Dec. 6.

BENT, Appellant; ROBERTS, Respondent.

Revenue—Income Tax (Sched. A.) and Inhabited House Duty—Occupation—Police Superintendent residing at Police Station—16 & 17 *Vict. c.* 34 (*Income Tax*)—14 & 15 *Vict. c.* 36 (*Inhabited House Duty.*)

The appellant, a superintendent of police, lived with his family in a house within the boundary of a police station which included other buildings used for the purposes of the police district. There was a yard to the house, and a wall which divided the appellant's premises from the remainder of the police station, to which a door in the wall afforded access. The front entrance of the house faced the street. The appellant kept the keys of the house, which he had himself furnished, and for the use of which a deduction was made from his salary. He was compelled to live in the house, as that was necessary for the discharge of his official duties; the house was liable to be used for such purposes connected with the police force as the chief constable might direct; and the appellant was liable to be removed from station to station at any time:—

Held, that the appellant had not such an occupation of the house as to render him liable to pay income tax or inhabited house duty in respect of it.

Case stated on appeal against an assessment under Schedule A of the income tax (1) and for inhabited house duty (2) on a house assessed at 50*l.* in each case, and occupied by the appellant, second superintendent of the police station at Stretford.

1. The county constabulary of Lancashire was established under 2 & 3 Vict. c. 93.

2. The county is divided into police districts or divisions, and station houses and strong rooms have been built and provided under 3 & 4 Vict. c. 88.

3. The force is annually inspected by a government officer, and if his report is satisfactory a grant is made by the Treasury in aid of the police rates, amounting to one-half of the expense of the pay and clothing of the force.

4. The house in which the appellant resides is included within the boundary of certain premises known as the Old Trafford police station, which comprises other buildings and offices provided for the purposes of the Manchester police district.

5. In addition to a communication between the appellant's house and the drill yard, there is a further communication between

(1) 16 & 17 Vict. c. 34, and 5 & 6 Vict. c. 35, s. 63, No. 9, rule 1.
(2) 14 & 15 Vict. c. 36, schedule.

the drill yard and the cell yard which adjoins and into which the cells open. (1)

6. It is necessary for the police purposes of the district of Manchester that the appellant should reside in the house in question for the due performance of his official duties.

7. The appellant is compelled to live on the premises in question, and the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct, and the appellant is further liable to be removed from station to station at any time.

8. There is no accommodation in the appellant's residence beyond what is actually necessary for the requirements of himself and his family and the transaction of his business as superintendent of police, and he would not be permitted to make use of the premises for any other purpose.

9. The appellant is not assessed to the poor rate.

10. The appellant admitted that the house which he occupied was separate from the police station, but added that there was a communication with the station yard by a doorway in his own yard wall. The front entrance was quite distinct. He said that he himself possessed the keys of the house, and that he and his family alone had access thereto; that it was wholly occupied by himself and family, and furnished throughout with his own furniture; that it might occasionally be used as a place of detention for prisoners; and that on one occasion he had admitted a female prisoner there for a few hours who was not in very good health, and who was of a more respectable class than prisoners ordinarily are.

11. He contended that he was not liable to house duty, nor to Schedule A of the income tax, beyond the amount of his rental, 10*l.* 8*s.* per annum, and the reasons assigned were that the house was a part of the police station, it being included within the boundary wall known as the Old Trafford police station, that the force was annually inspected by a government officer, and

(1) It appeared from a plan attached to the case that a boundary wall ran round the whole of the premises known as the Old Trafford police station. The appellant's house, yard, and garden were at one end of these premises; at the other were the offices of the police station, the cells and cell yard, and in the middle was a drill yard. The appellant's premises were separated from the drill yard by a wall of partition in which there was a door.

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that the whole of the premises were used for the purposes of the county constabulary, and, being so used, were used for government purposes, and were exempt from assessment as being occupied for the purposes of the Crown, and that in any case the house in question ought not to be separately assessed, but should be included in one charge with the police station, some of the apartments of which were occupied by police constables, who paid rentals for them.

In support of his opinion he cited *Reg.* v. *St. Martin's, Leicester.* (1)

12. The appellant admitted that he was the officer of the county, and was paid out of the county fund.

13. The surveyor submitted that the case referred to did not apply, and that as the house in question was admittedly separate and distinct from the police station, its front entrance facing the street or road (formerly an ancient footpath), and the only communication with the station yard being by a doorway in the wall of its yard, which doorway could easily be closed up, and its being moreover furnished throughout by the appellant as a private residence, it was to all intents and purposes a private house, and was separately assessable upon its full annual value, for which the appellant was liable, he being the beneficial occupier.

After considering the statements of the appellant and the surveyor, the commissioners were of opinion that the appellant was the servant of the county and not of the Crown, and that the house being separate and distinct from the police station (the only communication being by a door in the yard wall to the drill ground), and being furnished by the superintendent at his own expense, was liable to be assessed upon its full annual value, and from its position was separately chargeable, and they confirmed the assessment.

Gorst, Q.C. (*Hulton*, with him), for the appellant, contended that the appellant did not occupy the house, within the meaning of the Income Tax Acts or the Inhabited House Duty Acts, so as to be liable to the assessments made on him. He referred to *Clark* v. *Bury St. Edmunds.* (2)

(1) 2 Q. B. D. 493. (2) 1 C. B. (N.S.) 23; 26 L. J. (C.P.) 12.

A. Dicey, for the respondent. The case expressly states that the appellant occupies this house. He certainly uses it and that is sufficient to make him liable to income tax, 5 & 6 Vict. c. 35, s. 63, No. 9, rule 2. Whether, although occupying, he is exempt on any ground, is quite a different question, but what the Court are invited to do is to say that a man who lives in a house with his family, and has the key of the door, and pays a rent (1), does not occupy it, which is a contradiction in terms. The question which was to have been argued here was the question of exemption, but that would not arise if the appellant is decided not to occupy.

KELLY, C.B. The question in this case is, whether the appellant is the occupier of the premises in question within the meaning of the Inhabited House Duty Act, or within the meaning of the Income Tax Act, and it appears, according to the statement of the case before us, that the appellant has been assessed under both statutes in respect of the year's occupation from April, 1875, to April, 1876, and that the sums payable to the Crown in respect of the assessments, if they could be sustained, would be payable in January, 1876. The question we have to determine is, whether the occupation and the use of these premises by the appellant, in the manner and under the circumstances stated in this case, render him liable to either the one or the other of these assessments. I am clearly of opinion that he is not liable. If the case were confined to what is stated in paragraph 10 of the case, a question might well arise as to whether he might or might not be liable. But when we refer to paragraph 7, we find that the appellant, as an officer of the constabulary of Lancashire, is, by the duties of his office, and under the circumstances in which he holds that office and is paid a salary, compelled to live on the premises in question; that the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct; and that the appellant is further liable to be removed from station to station at any time.

(1) It did not appear by the case how or when the rent of 10*l.* 8*s.* was paid by the appellant.

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Now, any one of these portions of this paragraph would, in my opinion, be fatal to the argument on the part of the Crown, that the appellant has such an occupation of these premises as to render him liable to either of these assessments. A man who pays rent for premises has the right to occupy the premises under a contract between himself and the landlord, to whom, under the contract between them, he is bound to pay the rent. No such case exists here. This, though it is called a rent in the statement of the case before us, is clearly no rent at all; it is stated that the appellant is an officer of the constabulary, and that he is compelled to live upon these premises, but while he enjoys a lodging which probably saves him the rent of some lodging elsewhere, it amounts to nothing more than this, that the authorities by whom he is employed think fit to deduct from the salary that they pay him a certain sum, namely, 10*l.* 8*s.* a year, in consequence of the benefit that he derives from lodging in this house with his family during whatever time they may compel him to remain there. That is not a rent at all, it is not a tenancy at all, it is not an occupation at all in respect of the Acts which regulate and determine either of these assessments, and therefore, were it upon that ground alone, I should hold that this is not an occupation within the meaning of either of these Acts of Parliament. But the case says further, "that the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct." Under this power the chief constable might, either upon a particular occasion or on any number of occasions, where the proper conduct of the business of the police might require it, send any number of persons who might be taken into custody, and who were to remain in custody until the following morning before they would be taken before the magistrate, into this house, to the exclusion of the appellant. That also is inconsistent with the beneficial occupation or use of the house by a tenant who is liable to assessment under these Acts of Parliament. But then, when we come to the last provision in the 7th paragraph, we find that "the appellant is further liable to be removed from station to station at any time." Here is a man assessed to the Income Tax for the year, and assessed to the inhabited house duty for the

year, who might if it were thought fit, a week or a month, or even a single day, after the assessment, be removed to another place altogether, and might not occupy the house for a single day after the notice or the command is issued to him to quit the station and remove himself to another station. It is not arguable that this could be an occupation within the meaning of these Acts of Parliament. I am clearly of opinion, therefore, that he is not an occupier, but is merely a servant of the constabulary put into the house for their purposes, with liberty and permission to live in that house just as long as they think fit, and no longer: just as long as it answers their purposes and suits their public duties to leave him there, or desire or compel him to remain there, and no longer; and again, just as long as they may think it expedient that he should remain an officer in their establishment and not be removed to another station, and no longer. Under these circumstances, it clearly is not an occupation within these statutes.

CLEASBY, B. I must say that I was a good deal surprised at the statement of the learned counsel for the Crown that the point intended to be raised here was a different one from that which we are now considering. I refer to the case, and I see that this is the only point upon which the case is stated in paragraph 15: "After considering the statements of the appellant and the surveyor, the commissioners were of opinion that the superintendent was the servant of the county and not of the Crown, and that the house being separate and distinct from the police station (the only communication being by a door in the yard wall to the drill ground), and being furnished by the superintendent at his own expense, was liable to be assessed upon its full annual value." They state everything connected with the place to shew in what way it is connected with the police station, and not deciding anything upon the other question, the commissioners decide that it is to be regarded as if he were living apart from the police station altogether in a street in the town. If it were so, it would be quite a different thing, although he were paid by the police authorities, or there were an allowance made for it, and though he might be removable to a different station. The commissioners hold that he occupies

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premises so separated from the police premises as to make him liable to be assessed. Upon that, which is mainly a question of fact, we come to a different conclusion. What we have to consider is simply this: is he to be regarded as a person occupying or living upon these premises in any different manner from this, that he is allowed to live there upon part of the police premises? No one would contend, if the entrance were within the wall of the police premises, over which, of course, the police authorities would have the exclusive control, that the appellant was the occupier of the house, though he was the only person living in it. How can it make a difference if, for the more convenient enjoyment by their servant of the particular house—because it is to their interest to have servants who are satisfied and pleased with the conveniences that they enjoy—besides all the internal communication requisite for the discharge of his duties, they allow him to have an outer door into the footpath or street?

POLLOCK, B., concurred.

Judgment for the appellant.

Solicitors for appellant: *Ridsdale, Craddock, & Ridsdale, for Birchall, Wilson, & Hulton, Preston.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Nov. 19.

[IN THE COURT OF APPEAL.]

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Specific Performance—Unde lease—Waiver of Objection to Title—Constructive Notice of Provisions in Original Lease—Qualified Covenant not to assign or underlet without Consent—Clause of Re-entry not applicable to Negative Covenants—Usual Covenant—Covenant not to mow Meadow Land more than once a Year—Clause of Re-entry in case of Bankruptcy, Composition with Creditors, or Execution issued against Lessee—Merger—Reversion.

Where a parol contract is made for the grant of an underlease subject to a question of title, possession taken with the knowledge and consent of the grantor is not of itself a waiver of an objection to title by the grantee, but it is only evidence of the acceptance of the title, which may be rebutted by other circumstances.

Upon an agreement to grant an underlease the grantee has constructive notice

of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they were.

Where a lease provides that the lessee shall not assign or underlet without the consent in writing of the lessor, which, however, is not to be withheld from any assignment or underlease to a respectable and responsible person, it is unnecessary to the validity of an assignment or underlease to a person of that character that the consent of the lessor should be first obtained.

Semble, that a power of re-entry, upon the lessee wilfully failing or neglecting to perform any covenant, does not apply to a breach of a negative covenant.

In a lease of a farm a covenant not to mow meadow land more than once a year is not an unusual covenant, so as to excuse an intended assignee from accepting the title. But a power of re-entry in a lease, if the lessee and his assigns become bankrupt, or make a composition with creditors, or if execution should issue against either of them, is unusual, and an intended assignee is not bound to accept an assignment of a lease containing such a covenant.

Where a lessor, being himself a tenant for years, grants to his sub-lessee the residue of his interest from the termination of the existing sub-lease, the grant operates as an interesse termini, and the existing sub-lease does not merge; and a right of re-entry contained in the original lease would still exist and enable the lessor to re-enter for breach of covenant.

Semble, where two pieces of land are demised by one lease containing a power of re-entry over both, and afterwards the reversion in one of them is assigned to the lessee, the right of re-entry remains intact over the piece of land of which the reversion remains vested in the lessor.

APPEAL from the decision of the Exchequer Division, dismissing a motion that judgment should be entered for the plaintiff.

It was an action to enforce a specific performance, or, in the alternative, to recover damages for breach of a parol contract, alleged by the plaintiff to have been entered into by the defendant to accept a lease of a certain farm.

The facts of the case, the course at the trial, and the arguments of counsel are fully noticed in the judgment.

1876, 20, 21 Dec., and 1877, 15 Jan. *Fry, Q.C.*, and *Bompas* (*Langworthy* with them) for the plaintiff.

Sir H. S. Giffard, S.G., and *Serjt. Ballantine* (*Finlay* with them), for the defendant.

In addition to the cases mentioned in the judgment, the following were cited: *Clive* v. *Beaumont* (1); *Gaston* v. *Frankum* (2); *Upperton* v. *Nickolson* (3); *Mundy* v. *Jolliffe* (4); *Wilson* v. *Hartle-*

(1) 1 De G. & Sm. 397.
(2) 2 De G. & Sm. 561.
(3) Law Rep. 6 Ch. 436.
(4) 5 My. & Cr. 167.

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pool Ry. Co. (1); *Palmer* v. *Edwards* (2); *Baker* v. *Gostling* (3); *Tilley* v. *Thomas* (4); Shelford's Real Property Statutes, 8th ed., by Carson, at p. 711, n.; Co. Lit. 215 *a*, 303 *b*.

As to the production of further evidence at the hearing, the plaintiff's counsel referred to Order LVIII., Rule 5, and *Hastie* v. *Hastie*. (5)

Cur. adv. vult.

1877. Nov. 19. BRETT, L.J., read the judgment of Cockburn, C.J., and Brett, L.J. (6)

This action was brought to enforce a specific performance, or in the alternative to recover damages for breach of a parol contract, alleged by the plaintiff to have been entered into by the defendant to accept a lease of a farm in Sussex, called Freek's Farm, under the following circumstances.

By an indenture dated the 10th of October, 1870, and made between Robert Collins Bayntun of the one part, and John Nicholas of the other part, in consideration of the rent and covenants thereinafter reserved and contained, and on the part of Nicholas, his heirs, executors, administrators, and assigns, all of whom were thereinafter included in the word lessee, to be paid and observed, Bayntun granted to Nicholas a lease of the said Freek's Farm, therein described as a portion of a larger farm of the same name, and also of another farm called Bridge Farm, which was adjoining or near to Freek's Farm, for the term of fourteen years from the 29th of September, 1870, at one undivided rent of 330*l.* per annum. The lease contained among other covenants not necessary to be stated, a covenant on the part of the lessee not to mow meadow land more than once in a year, and not to assign or underlet the said premises or any part thereof for all or any part of the term without the previous consent in writing of the lessor, such consent, however, not to be withheld from any assignment or underlease to any respectable and responsible person. There was also a proviso that if at any time

(1) 2 De G. J. & S. 475.
(2) 1 Dougl. 187 n.
(3) 1 Bing. N. C. 27, 251.
(4) Law Rep. 3 Ch. 61.
(5) 1 Ch. D. 562.
(6) The case was argued before Cockburn, C.J., Brett and Amphlett, L.JJ.; the judgment was prepared by Sir Richard Amphlett, who had resigned before it was delivered.

the rent should be in arrear, or if the said lessee should wilfully fail or neglect to perform any of the covenants and agreements on his part to be done and performed, or if the lessee should become bankrupt or make any composition with his creditors, or if any execution should issue against him, in either of such cases the lessor might re-enter.

By an indenture dated the 22nd of December, 1871, Nicholas assigned the said lease to one Mills, and by another indenture dated the 10th of October, 1873, Mills assigned the same to the plaintiff. The rent of 330*l.* reserved by the lease appears to have been under some circumstances not stated to us, and doubtless immaterial so far as this action is concerned, reduced to 310*l.* which will therefore be hereinafter referred to as the actual rent payable under the said lease.

It may be useful to observe, with reference to the contention between the parties on some points in this case, that Bayntun was the freeholder of Freek's Farm, but that he only held the Bridge Farm under a lease, dated the 6th of January, 1869, from two persons named Benjamin Alfred Arnold, and Charles Edwin Ogden, for twenty-one years from the 29th September, 1868, which would therefore expire on the 29th of September, 1889, just five years after the expiration of the said lease from Bayntun to Nicholas of the 10th of October, 1870.

The plaintiff for some time after the said assignment to him from Mills occupied both the said farms himself, but in the spring of 1875 he became desirous of underletting Freek's Farm, and hearing that the defendant, who was a gentleman of respectability living in a house very near to Freek's Farm, had been making some inquiries with a view of taking it, the plaintiff wrote to the defendant a letter dated the 11th of May, 1875, in which he said that he had decided to let Freek's Farm, and amongst other things stated expressly that the rent he paid for it was 220*l.* per annum.

A negotiation then ensued between the plaintiff and the defendant for an underlease of Freek's Farm, and on the 18th of May they went over the farm together, and in answer to an inquiry from the defendant the plaintiff informed him that he held the same under a lease of which he believed eight or nine years to be unexpired, and that he was willing to transfer to the defendant

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the remainder of his term on the same terms and conditions as those on which he held it. In fact, however, the plaintiff held under no separate lease of Freek's Farm at the rent of 220*l.* or any other sum, but as has been stated held both Freek's and Bridge Farms as assignee of the lease from Bayntun to Nicholas of the 10th of October, 1870, at an undivided rent of 310*l.* per annum. It follows that either farm might be distrained upon for the whole of this amount; and the tenant of either farm might be evicted for a breach of covenant committed by the tenant of the other.

On the same 18th of May, after going over the farms, the plaintiff and defendant went together into the defendant's house; and it was there arranged that the defendant should take the farm upon the terms offered by the plaintiff, and that complete possession should be given to the defendant on the 24th of June then next. It was further agreed that the defendant should also have the right of sporting over the farm on payment of 100*l.*, being the same sum which the plaintiff had paid for it to Bayntun, and that certain provisions should be made for the valuation of stock and crops, to be taken to by the defendant, which are not necessary to be here stated.

There is no dispute as to the terms of this arrangement; but the plaintiff has all along contended that the arrangement was a final and concluded agreement, while the defendant contends that it rested on negotiation only, and was subject to the approval of his solicitors. A draft agreement was afterwards sent by Messrs. Parkers, the plaintiff's solicitors, to the defendant accompanied by a letter dated the 25th of May, 1875, which was as follows: "At the request of Mr. Hyde, of Bridge House Farm, who we understand has agreed to let you Freek's Farm for the rest of his tenancy, we have prepared, and herewith send you, the draft of such agreement as we think should be signed between yourself and Mr. Hyde. Would you kindly peruse it, and as we presume you will wish to have it approved by your solicitors, forward it to them and request them to return it approved to us."

On the same 25th of May, the defendant, being in want of keep for his cows, obtained the plaintiff's consent to take possession of one of the fields belonging to the farm, and turned out his cows therein, and with the knowledge and without any objec-

tion on the part of the plaintiff, made a cesspool thereon for the convenience of his house, and exercised other acts of ownership thereon; and on the 24th of June, the day fixed for that purpose, the defendant was let into possession by the plaintiff of the remaining part of the farm.

In the meantime the defendant's solicitors, Messrs. Black, Freeman, & Gell, to whom the defendant had sent the draft agreement, requested Messrs. Parkers to furnish them with a copy of the lease, referred to in the draft as that under which plaintiff held (being the lease from Bayntun to Nicholas of the 10th of October, 1870), and the same was sent to them on the 3rd of June, 1875.

On the 14th of June Messrs. Black, Freeman, & Gell, in reply to a letter from Messrs. Parkers pressing for a return of the said draft approved, wrote to them as follows: "Warden and Hyde. In reply to your favour of Saturday, the terms of the original lease are of such a nature that we really cannot advise Mr. Warden to accept the tenancy. We hope to-morrow to return your draft with our remarks thereon, to see whether the superior landlord can release any of the covenants. Some of them are extremely objectionable, viz., the power to resume for building purposes, and the determination on the bankruptcy of the lessee, and there are some other points as to the farm."

On the 19th of June Messrs. Black, Freeman, & Gell returned the copy-lease, having placed marginal notes against the clauses to which they objected.

The only objections so taken which were relied upon by the defendant in the argument before us, and to which, therefore, we may confine our attention, were, first, to the covenant not to mow meadow land more than once a year, it being suggested that there could be no objection to mowing more than once a year if an equivalent was put on the land; and secondly, to the provision giving a right of re-entry if the lessee should become bankrupt or make any composition with his creditors, or if any execution should issue against him.

An interview afterwards took place between the solicitors, when the objections to the provisions of the lease were discussed, and on the 28th of June Messrs. Parkers wrote to Messrs. Black, Freeman, & Gell a letter containing the following passage: "After

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seeing you on Saturday last we called upon Mr. Waugh, at Cuckfield. Mr. Waugh is Mr. Bayntun's solicitor, and on our explaining matters to him, he has agreed to grant an entirely new lease of Freek's Farm to Mr. Hyde, omitting the clauses to which you object, with the exception of the clause relating to the not mowing of the pasture more than once in a year. This Mr. Waugh will not give way upon, although we offered that an equivalent in manure should be put upon the land.' We hope, therefore, you will see your way to waiving this objection." In a letter of the 1st of July, 1875, Messrs. Black, Freeman, & Gell suggested to Messrs. Parkers that if a new lease were to be granted it should be to the defendant direct. This suggestion was communicated by Messrs. Parkers to Mr. Waugh, the solicitor for Bayntun, in a letter dated the 2nd of July, with an intimation that on behalf of the plaintiff they did not see any objection to that suggestion being acted upon.

Various attempts were thereupon made on the part as well of the plaintiff as of the defendant, who at that time, at all events, was very anxious to take the Freek's Farm, to obtain a new lease from Bayntun, which it was stated in Messrs. Parker's letters of the 28th of June he had agreed to give, and a long correspondence ensued on the subject between Messrs. Parkers, Messrs. Black, Freeman, & Gell, and Mr. Waugh, Bayntun's solicitor, which it is unnecessary further to notice; but it was ultimately found impossible to obtain any such new lease, either to the plaintiff or direct to the defendant, except upon terms to which the plaintiff would not submit; and, in consequence, the defendant, in the month of August, declined to accept the proposed underlease from the plaintiff alone, and offered to re-deliver possession of the farm, which was at first declined by the plaintiff, but was afterwards accepted upon the terms that such acceptance should be without prejudice to the rights of the parties.

Under these circumstances, this action was commenced on the 21st of August, 1875, seeking the specific performance of the parol contract, and the same came on for trial before Lord Coleridge at Lewes on the 9th of March, 1876.

It was not disputed that if there was a concluded parol agreement, the taking possession and acts of ownership were sufficient

to take the case out of the Statute of Frauds; and the only issue of fact on that trial was whether there had been such a concluded agreement, or, as the defendant contended, only a negotiation for an agreement; and upon that issue a verdict was found for the plaintiff. It was assumed throughout the trial by all parties that the question of title was to be left open, and not affected by a verdict in favour of the contract; and, accordingly, Lord Coleridge did not direct judgment to be entered, but reserved liberty to either party to apply to the Court above for judgment, when the question of title would be more conveniently discussed.

The cause accordingly came on before the Exchequer Division on the 24th of May, 1876, upon a motion by the plaintiff that judgment should be entered for him for the specific performance of the agreement, and for consequential directions, and upon a motion on the part of the defendant to make absolute a rule nisi which he had obtained for a new trial, and the Court being of opinion that the plaintiff was not in a position to grant such an underlease as the defendant was entitled to without the assistance of the superior landlord, which could not be obtained, directed judgment to be entered for the defendant without costs, and that the plaintiff should have his costs up to the time of the payment of a certain sum of money into court, in respect of damage alleged to have been done by the defendant while in possession, and as to which no further question arises.

This decision was challenged by the present appeal on the part of the plaintiff; and the defendant gave notice that on the hearing of such appeal he should apply that the judgment of the Exchequer Division might be varied, by directing the plaintiff to pay to the defendant the defendant's costs of the action; and that he should, if necessary, rely upon the rule for a new trial (on which no opinion was expressed by the Exchequer Division), and apply to the Court of Appeal for a new trial accordingly, or for judgment upon the ground, that no agreement was proved which was sufficiently complete to be subject of a claim for specific performance, as well as on the grounds on which judgment was given by the Exchequer Division.

Before discussing the objections raised to the plaintiff's title, it will be as well to notice the contention of the plaintiff that the

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defendant had by taking possession accepted the title. We think that this contention cannot be sustained. For where possession is taken, as in this case, with the knowledge and consent of the grantor, it amounts only to evidence of an acceptance of the title, which may be rebutted by circumstances shewing that it was not intended by the parties to have that effect. In this case we think that the conduct of the parties shews conclusively that there was no such intention; since at the time when possession was given of the main part of the farm, on the 24th of June, objections to the title had been distinctly raised by the defendant's solicitors, and correspondence respecting the same between the solicitors was continued for a considerable period after such possession had been taken. In fact, although the taking possession was in such correspondence, and throughout the proceedings in the action, insisted upon as a part performance, so as to take the case out of the Statute of Frauds, it was never alleged on behalf of the plaintiff, until the hearing of the appeal before us, that such taking possession had the further effect of being an acceptance of the title.

But then it was urged on the part of the plaintiff that the defendant by contracting for an underlease, must be taken to have had constructive notice of the provisions of the original lease, when he took possession of a portion of the premises on the 25th of May; and that at least all objections apparent on the face of the lease were thereby waived; and the case of *Cosser* v. *Collinge* (1) was relied upon in support of that proposition. But we think it may be considered as settled that the principle of that case can only be applied where (as indeed was the fact in *Cosser* v. *Collinge* (1)), the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease: see *Grosvenor* v. *Green* (2); *Smith* v. *Capron*. (3) In the present case there was no such fair opportunity before the copy lease was sent to the defendant's solicitor as hereinbefore mentioned. For the contract was made at the defendant's house, when it is not pretended that the plaintiff had with him the lease, or any copy; and, indeed, the fact that the plaintiff (as he admits)

(1) 3 My. & K. 283. (2) 28 L. J. (Ch.) 173.
(3) 7 Hare 185.

informed the defendant that he held Freek's Farm on a lease at 220*l.* per annum, which was entirely incorrect, affords abundant evidence that such lease was not produced, or its provisions properly explained to the defendant, at the time the contract was entered into. It is true that the defendant had not merely constructive but actual notice of the provisions of the original lease, when he took possession of the remaining part of the property on the 24th of June; but that, as has been already observed, was after certain specific objections to those provisions had been taken and had become the subject of a correspondence between the solicitors, which continued for some time afterwards without any waiver of such objections being insisted upon or even mentioned.

Under these circumstances we are of opinion that the specified objections to the provisions of the original lease have not been waived, and must be considered on their merits.

It is quite a different question whether it is now open to the defendant to take other objections to those provisions, not specified in the margin of the copy lease when returned by the defendant's solicitors. We are of opinion that it is not so open to him, where such objections were known and might have been insisted on before possession was taken, and that such objections, even if valid, ought to be considered to have been waived. This disposes of one objection urged before us to the title which would otherwise have been fatal, viz., that the original lease was not, as represented, a lease of Freek's Farm only at a rent of 220*l.*, but of the two farms at one undivided rent of greater amount. For this objection was patent on the lease itself, and yet was not noticed in the margin of the copy lease when returned, nor, indeed, at any time during the correspondence which ensued, and must therefore, we think, be considered as having been waived by the taking of possession.

We proceed to consider the objections taken to the title which have not been waived. The first was that there was no evidence of the consent in writing of Bayntun or his mortgagees to the proposed underlease. We think that this objection cannot be sustained. It was stipulated that such consent should not be withheld from an assignment or underlease to a respectable and responsible person; and no imputation has been made against the respectability or responsibility of the defendant; and consequently any

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attempt on the part of Bayntun or his mortgagees to eject the defendant, on the ground that no consent in writing had been given, would fail: see *Treloar* v. *Bigge*. (1) Moreover we should, if it were necessary, be prepared to hold that the contention of the plaintiff is correct, that the power of re-entry, being only in the event of the lessee "wilfully failing or neglecting to perform any of the covenants," does not apply to a breach of a negative convenant: see *West* v. *Dobb*. (2)

The only remaining objections necessary to be considered are those taken to two of the provisions of the lease, viz., the unqualified covenant not to mow meadow land more than once a year, and the power of entry in case of the bankruptcy, &c., of the lessee, both of which provisions were said on behalf of the defendant to be unusual and unreasonable. With regard to the first of these provisions we think that the objection fails. For although it is undoubtedly very common in farming leases to qualify a covenant not to mow meadow land more than once a year, by excepting from its operation cases where an equivalent in the shape of manure is brought on the land, it is by no means invariable to do so, and in our opinion the omission of such qualification is not sufficient to make the covenant so unusual or unreasonable as to give a right to the defendant to object to the title on that account. But, as to the other provision objected to, namely, the power of re-entry not only if the lessee (which word is expressly declared to include assigns) should become bankrupt, or make any composition with his creditors, but also if any execution should issue against him, such provision appears to us unusual and unreasonable, especially in the present case, where the defendant would be liable to be evicted for breach of the condition not only by himself, but by the original lessee Nicholas, of whose circumstances he might very probably know nothing. The Court, therefore, ought not in our opinion to compel the defendant to take an underlease if he would thereby be exposed to such a liability.

So matters stood upon the evidence presented to the consideration of the Court below; but the plaintiff, in pursuance of notice, applied to us for leave to produce additional evidence, for the

(1) Law Rep. 9 Ex. 151. (2) Law Rep. 5 Q. B. 460.

purpose of shewing that there had been a severance of the reversion in the two farms comprised in the original lease from Bayntun to Nicholas, which, according to the doctrine established in *Knight's Case* (1), and in *Twynam* v. *Pickard* (2), would destroy the power of re-entry reserved in the lease, and thus cure the defect in the title lastly discussed; and the defendant not objecting, we allowed such additional evidence to be given. It consisted of three indentures, the effect of which it will be convenient to consider separately.

The first of these indentures, dated the 21st of January, 1874, was made between Bayntun of the one part, and the plaintiff of the other. By this indenture, after reciting the assignment of the 10th of October, 1873, from Mills to the plaintiff of the residue then unexpired of the term granted by the lease from Bayntun to Nicholas, of the 10th of October, 1870, and that Bayntun had agreed to grant to the plaintiff an extension of his term, so far as regarded Bridge Farm, together with certain rights of sporting not affecting the questions arising in this action, it was witnessed (amongst other things) that Bayntun demised to the plaintiff the Bridge Farm for a term of five years from the 29th of September, 1884 (that being the day when the former lease of the 10th of October, 1870, would expire), but subject to the last-mentioned lease, as long as the same should subsist, at the rent of 180*l.* during the said term of five years thereby granted, being an improved rent of 100*l.* over and above the 80*l.* reserved in the original lease of Bridge Farm to Bayntun of the 6th of January, 1869. It was argued on the part of the plaintiff that, as the further lease of Bridge Farm for five years from the 29th of September, 1884, would expire at the same time as the original lease of the Bridge Farm to Bayntun of the 6th of January, 1869, such further lease would, according to the decisions of *Parmenter* v. *Webber* (3) and *Beardman* v. *Wilson* (4), amount to an assignment of the original lease, and thus effect a severance of the reversion. But it will be observed that such further lease is not to commence until the 29th of September, 1884, when the former lease from Bayntun to Nicholas, and then vested in the plaintiff, would expire. It was not, there-

(1) 5 Rep. 54 *b*.
(2) 2 B. & A. 105.
(3) 8 Taun. 593.
(4) Law Rep. 4 C. P. 57.

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fore, a lease of the reversion but a reversionary lease, or in other words an interesse termini, which is only a right and not an estate, and, according to a well-established principle of law, would neither cause nor prevent a merger. In the meantime, therefore, until the interesse termini ripens into an estate, which will not be until the expiration of the lease of Bayntun to Nicholas, the reversion will continue in Bayntun, and there will be no severance, and consequently no destruction of the right of re-entry. In fact, until that time it cannot be ascertained whether the further lease will or will not operate as an assignment; for if, during the pendency of the lease from Bayntun to Nicholas, Bayntun should obtain from the superior landlord an extension of his term in Bridge Farm, his further lease to the plaintiff would undoubtedly operate according to its purport as an underlease, and not as an assignment. Moreover, the grant of the further lease is expressly made subject to the former lease from Bayntun to Nicholas of the 10th of October, 1870, which, even if the said grant had operated as an immediate assignment of the reversion in Bridge Farm, would have kept alive the right of re-entering over Bridge Farm, and à fortiori over Freek's Farm, even if it would have been otherwise destroyed: see the case of *Doe* v. *Bateman* (1), where it was held that if A., being possessed of a term of years, demised his whole interest to B., subject to a right of re-entry on the breach of a condition, A. might, by virtue of the agreement between the parties, re-enter for the condition broken, although he had no reversion.

The second of the said indentures relied upon by the plaintiff, dated the 9th of September, 1875, was made between the said Benjamin Alfred Arnold and Charles Edwin Ogden of the first part, one Sarah Ann Arnold of the second part, the plaintiff of the third part, and Bayntun of the fourth part. After reciting the lease of the Bridge Farm from Arnold and Ogden to Bayntun of the 6th of January, 1869, and that, under and by virtue of the lease from Bayntun to Nicholas of the 10th of October, 1870, and of the assignment thereof from Mills to the plaintiff of the 10th of October, 1873, and of the further lease from Bayntun to the plaintiff of the 21st of January, 1874, the plaintiff was lessee or assignee under Bayntun of the Bridge Farm for the residue of the term

(1) 2 B. & A. 168.

created by the lease from Arnold and of Ogden to Bayntun of the 6th of January, 1869, and of other hereditaments the property of Bayntun (meaning Freek's Farm) at a rent of 310*l.* until Michaelmas 1884, and thereafter at the rent of 180*l.* for the Bridge Farm alone during the residue of the term; and further reciting that on the 18th of January, 1875, an action of ejectment had been commenced by Arnold and Ogden and Sarah Ann Arnold against Bayntun and the plaintiff for the recovery of the possession of Bridge Farm, for an alleged forfeiture by breaches of several of the covenants contained in the lease of the 6th of January, 1869, and reciting that by an order made in the action by consent of all parties thereto, it was ordered that the proceedings in the action should be stayed upon the terms following, that was to say: 1. Hyde to continue tenant of the Bridge Farm. 2. Bayntun to assign from Lady-day, 1873, all his interest in the lease from Arnold and Ogden to himself, with the license and approval of Arnold and Ogden, such assignments to be prepared by their solicitor, and the costs thereof to be paid by Hyde. 3. Arnold and Ogden to waive all claims in respect of any breach or breaches of covenant under the lease, and Hyde to be allowed till Michaelmas, 1876, to remedy existing breaches of covenant. 4. Hyde to pay Arnold and Ogden direct the rent payable under the lease. 5. Bayntun to be released by Arnold and Ogden from all liability in respect of covenants in the lease, past or future. 6. All payments of rent made under provision 4 by Hyde to Arnold and Ogden to be allowed by Bayntun in settling rent as between Hyde and Bayntun. By 7, 8, and 9 certain payments are provided for, not necessary to be here stated. 10. Subject to provisions 4 and 6, the rights to and relating to the recovery of rent, whether by action, distress, or otherwise, from Hyde to Bayntun, to remain as under existing leases from Bayntun to Nicholas and Bayntun to Hyde, it was witnessed that Arnold and Ogden and Sarah Ann Ogden, in pursuance of the order, and in part performance thereof, released Bayntun from all the covenants, clauses, and agreements in the recited indenture of lease contained, and from all liability, past, present, and future in respect thereof, provided that nothing therein contained should extend to put an end to or determine the lease or the indenture of the 10th of October, 1870, the 10th of October,

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1873, and the 21st of January, 1874, or otherwise vary or affect the same, save as appeared by those presents, or to release or discharge the plaintiffs in the recited action from payment to Bayntun of the improved rent reserved under the last mentioned indenture during the then residue of the term granted by the indenture of lease of the 6th of January, 1869, or to in any way diminish or prejudice the right of Bayntun to and relating to the recovery of such rent, save that the plaintiff should pay direct to the persons entitled thereto the rent of 80*l.* reserved by the lease of the 6th of January, 1869, instead of paying the same through Bayntun.

It was contended on behalf of the plaintiff that the effect of the indenture, taken in conjunction with the consent order in the action therein recited, was in equity to transfer all Bayntun's interest in Bridge Farm to the plaintiff, except only the rights to and relating to the recovery of rent under the lease from Bayntun to Nicholas of the 10th of October, 1870, and under the further lease of Bayntun to the plaintiff of the 21st of January, 1874, and thus to create a complete severance of the reversion in the two farms. Now assuming this construction of the indenture and order to be correct, which we think it is, subject to an observation to be made presently as to the terms in which an actual assignment of such interest would probably be directed by the Court, still the question arises whether the assignment by the lessor of the reversion in one of two farms comprised in the same lease to the lessee himself falls within the principle of *Knight's Case* (1), so as to destroy the right of re-entry over both farms. Although we are not aware of any authority one way or other on the point, we think that it has not that effect. Where, indeed, the reversion is so dealt with as to be vested in two different persons (other than the lessee himself) the inconvenience and hardship upon the lessee of being exposed to two actions of ejectment for breach of any condition in the lease may well explain and justify the rule; but where the reversion of one of the farms is assigned to the lessee himself, there is obviously no such inconvenience or hardship. Such an assignment would cause a merger and determination of the term in the farm of which the reversion

(1) 5 Rep. 54 *b*.

is so assigned; but as both the term and reversion would continue in the other farm, it is not easy to assign any satisfactory reason why the right of entry and other incidents to the reversion in that farm should not also remain intact. But, further, if there is any doubt on this point, it must be observed that Bayntun has not yet executed any assignment of his interest in the lease of Bridge Farm of the 6th of January, 1869, as directed by the order in the action hereinbefore recited; and I think that no such assignment would be directed by the Court, if applied to, without providing that it should not affect the right of re-entry over Freek's Farm, which it clearly was not the intention of either party to disturb.

The third and last of the indentures relied upon by the plaintiff was dated the 3rd of March, 1876, and was made between Arnold and Ogden, of the first part, Sarah Ann Arnold, of the second part, and the plaintiff, of the third part, whereby it is recited that the Bridge Farm has become vested in the plaintiff for the residue of the term of twenty-one years granted by the lease of the 6th of January, 1869, to Bayntun, and fresh arrangements are come to between the lessors and the plaintiff upon that footing, but as Bayntun was no party to that deed, his rights cannot be affected by its contents, and no further notice therefore need be taken of it.

Under the circumstances it appears to us that none of those deeds have the effect contended for of destroying Bayntun's right of re-entry over Freek's Farm in the event of the bankruptcy, &c., of the lessee, and the objection to the title on that ground is therefore not cured. No doubt with the assistance of Bayntun this objection could be removed and a good title could be made; and we are pressed to direct a general inquiry as to title in order that the plaintiff might have an opportunity of trying again to obtain Bayntun's concurrence. But no evidence was adduced before us that there was a better prospect of obtaining it now than when he refused it in 1875; and considering that Freek's Farm was, as both parties know, required for the defendant's immediate occupation as a farm, we quite agree with the judgment of the Court below, that it would not be right or just to the defendant to allow further delay upon the mere chance of obtaining such concurrence.

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It remains to consider the cross notice of the defendant. That part of the motion, which sought to have the judgment of the Court below varied with respect to the costs, was abandoned by counsel on the hearing of the appeal; and the view we have taken in the question of title makes it unnecessary for us to express any opinion on the rest of the motion, and we think, under the circumstances, that no costs ought to be given of the motion to either side.

On the whole, we think the decision of the Court below was right and must be affirmed; and that the appeal must be dismissed with costs; and that no order ought to be made as to the defendant's cross motion as to costs or otherwise.

Judgment affirmed.

Solicitors for plaintiff: *Black, Freeman, & Gell.*
Solicitors for defendant: *Parkers.*

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THE GUARDIANS OF THE POOR OF THE WESTBURY-ON-SEVERN UNION, APPELLANTS; THE OVERSEERS OF THE POOR OF THE PARISH OF BARROW-IN-FURNESS, RESPONDENTS.

Poor Law—Settlement by Derivation—Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

The 1st paragraph of s. 35 of the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), which abolishes derivative settlements, except in the case of a wife from her husband, and of a child under the age of sixteen from its parent, is to be read retrospectively as well as prospectively, both in the enacting part and in the exception.

A pauper born in 1841 had while under the age of sixteen and before the passing of the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), derived a settlement from his father, who had acquired a settlement by estate, and the pauper never acquired any settlement of his own:—

Held, that though the enacting part of the 1st paragraph of s. 35 of that Act would, but for the exception, have destroyed the derivative settlement, the case fell within the exception, and that the pauper therefore retained the derivative settlement after the Act.

SPECIAL CASE stated by consent, and by order of Lopes, J., in pursuance of 12 & 13 Vict. c. 45, s. 11.

On the 27th of October, 1877, the respondents obtained an

order of justices of the county of Lancaster (within which county the parish of Barrow-in-Furness is situated), adjudicating the settlement of James Dorrington, a lunatic pauper, to be in the parish of East Dean, in the county of Gloucester, and in the appellant union.

1. The lunatic is the legitimate son of Thomas and Ann Dorrington, and was born at Littledean Hill, in the county of Gloucester, on the 31st of March, 1841, which place at the time of the birth and till the passing of 5 & 6 Vict. c. 48, was extra-parochial, but was included in the parts of the Forest of Dean which by that statute became a township under the name of East Dean.

2. The pauper never acquired a settlement in his own right, but resided with his father until he was upwards of seventeen years of age.

3. The father of the pauper, before the pauper had attained the age of sixteen years, viz., in 1855, was seized of a certain dwelling-house situate at Bilson Green, in the township of East Dean, in the county of Gloucester, and in the appellant union, and so continued seized thereof until 1862, and resided and slept in that township in such dwelling-house for forty days during the time he was so seized thereof.

The respondents contend, and the appellants deny, that the pauper upon the above facts is settled in the township of East Dean in the appellant union.

The question for the opinion of the Court is whether on the above facts the legal settlement of the pauper is in the township of East Dean. If the Court should be of opinion in the affirmative, the order of justices is to stand, if otherwise, to be quashed.

The case was argued between counsel as if it had expressly stated that the pauper had acquired from his father a derivative settlement in the township of East Dean, and would therefore be removable to the appellant union, if the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), had not passed, and that the only question was upon the construction of that statute.

Jan. 29. *Anstie* (*J. D. Greene* with him), for the appellants. The question is whether s. 35 of 39 & 40 Vict. c. 61, has destroyed the derivative settlement within the appellant union which the

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pauper had acquired from his father. The appellants contend that it has. Sects. 34, 35, and 36 must be read together. (1) Sect. 34 turns irremovability into settlement. Sect. 35 abolishes derivative settlements except in certain cases. Sect. 36 provides that the provisions of the Act as to settlement shall not have a retrospective effect in certain cases (of which the present is not one), and therefore implies that they shall have a retrospective effect in all other cases. Now, there are but two sections in the Act relating to settlement, ss. 34 and 35, and it has been decided in *Reg.* v. *Guardians of Ipswich Union* (2), that s. 34 is not retrospective. There remains, therefore, nothing to which s. 36 can be applicable except s. 35, and this shews that s. 35 must have some retrospective operation. The opening words of that clause, therefore, destroy the derivative settlement which the pauper acquired, before the passing of the Act, in the appellant union. But the respondents will contend that the

(1) Sect. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient."

Sect. 35: "No person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

Sect. 36: "The provisions relating to settlement shall not apply to any pauper removed under any order of removal, or without such order under the provision in that behalf contained in the Union Chargeability Act, 1865, before the passing of this Act, or in receipt of non-resident relief lawfully given, or in respect of whom any order of removal shall be pending at the passing of this Act."

(2) 2 Q. B. D. 269.

exception in s. 35 is also retrospective, and applies to children who were above sixteen at the passing of the Act. Such a construction would involve the reading in of several additional words, and the exception would run thus: "except in the case of a child under the age of sixteen, *or of a child who had while under the age of sixteen, and before the passing of the Act, acquired a derivative settlement from its father or its widowed mother*, which child shall take, *or shall be deemed to have taken*, the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain, *or shall be deemed to have retained*, the settlement so taken until it shall acquire, *or shall have acquired*, another." There are no such retrospective words in the exception, which is purely future in its language. The object of sect. 35 was to prevent remote and expensive inquiries into derivative settlements, and it therefore limits the inquiry to children under sixteen years at the time of the passing of the Act, children of that age being already protected by 9 & 10 Vict. c. 66, s. 3, which prevented their being separated from their parents. Any other construction would make it very difficult to construe the 3rd paragraph of s. 35, and more words would have to be read in.

Lumley, for the respondents. The answer is twofold. First, the opening words of s. 35 are not retrospective. In construing statutes the Court always has a bias against destroying existing rights and liabilities. If the appellants' construction is right it will involve a great shifting of liabilities thoughout the country. There is nothing in the language of s. 35 more retrospective than in s. 34, which has been held not to be retrospective in *Reg.* v. *Guardians of Ipswich Union.* (1)

[HAWKINS, J. Then what "provisions relating to settlement" are retrospective, so as to give effect to the implication contained in s. 36?]

This Court is only bound by the decision in *Reg.* v. *Guardians of Ipswich Union* (1) so far as it is a decision directly upon the construction of s. 34, and is entitled to consider s. 35 independently of the correctness or otherwise of that decision. But, secondly, if the first clause of s. 35 is retrospective, then so must the exception

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be. The object of the section was to get rid of two difficulties which entailed great trouble and expense at sessions—one, that which arose when it was sought to go further back than a parent's birth settlement or that acquired by the parent himself, for instance, to a settlement derived by the father from the grandfather. The effect of the section is to abolish all derivation of settlements, except by the wife from her husband, and by the child from the parent of the settlement acquired by the parent for himself, or the parents' birth settlement, so as to avoid going back further than the parent; and, secondly, to fix the age of emancipation at sixteen. If the appellants are right, a child who at the time of the passing of the Act was sixteen and was living with his father will be separated from the father if both become chargeable, whereas a child who at that time of the passing of the Act was one day under sixteen would not. As to the language of the exception, it has been held that where a clause has a retrospective effect, words in an exception which have grammatically only a prospective meaning, may receive a retrospective interpretation, in order to make a reasonable construction: *Reg.* v. *Inhabitants of Christchurch.* (1)

Anstie, in reply.

Cur. adv. vult.

Feb. 4. The judgment of the Court (Cleasby, B., and Hawkins, J.) was delivered by

CLEASBY, B. The question in this case arises upon the 35th section of 39 & 40 Vict. c. 61. The pauper, as the law stood before the passing of that Act, had acquired a settlement in a parish in the Westbury Union derived from his father with whom he lived until he was upwards of seventeen years old. He had never acquired any settlement of his own.

It was contended on behalf of the appellants that the effect of the 35th section was to take away this derivative settlement; and the argument was, that the first part of the section destroyed the derivative settlement, and that the exception applied only to derivative settlements acquired after the passing of the Act.

To this two answers were given. One, that the 35th section was prospective altogether, and only applied to settlements gained

(1) 12 Q. B. 149; 18 L. J. (M.C.) 28.

after the passing of the Act; the other, that if the first part was retrospective the exception applied to settlements previously gained also. Upon the first question of the whole enactment of the 35th section being prospective, the case of *Reg.* v. *Guardians of Ipswich Union* (1) was referred to, in which the Queen's Bench Division had decided that the 34th section, which related to the same subject, viz., the subject of settlements, was not retrospective, acting upon the well-known rule that enactments which affect the future rights of parties are to be construed as applicable to future and not past transactions, unless there is a clear intention expressed that they shall also be applicable to past transactions.

We are not dealing with the 34th section but the 35th, and there is some difference in the language. Without questioning the decision upon the 34th section we are compelled to say that in construing the 35th we must give effect to the 36th. The 36th section enacts that the provisions as to settlement (including necessarily the 35th section) shall not take effect where there has been an order of removal, &c., which is as much as saying that they shall take effect and replace the old law in general, but not where the old law has been acted on. It would be giving no effect to the 36th section to hold otherwise, and we are not at liberty to reject a whole clause from an Act of Parliament which is obviously directed to a particular purpose.

The 35th section, then, being retrospective in its operation and applying to all derived settlements acquired before the passing of the Act or to be acquired afterwards, the question is, what effect is to be given to the exception. Unless there is something in the language strongly pointing to a contrary conclusion, we ought certainly to read the whole clause as either prospective or retrospective. An exception is something taken out of what has gone before, and if what has gone before was retrospective only it would almost follow that that which is excepted is the same. But in the present case the first part of the clause is no doubt prospective as well as retrospective, and it may therefore be argued that the exception applies to it only so far as it is prospective. And the language and subject-matter of the exception might, no doubt, be such as to make this a proper conclusion.

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But, without examining critically the language and grammar of the passage, we find nothing to justify us in saying that the enactment is to operate retrospectively, and the exception prospectively only. The effect of so holding would be, that a woman whose husband died the day before the coming into operation of the Act would lose her derivative settlement, and a woman whose husband died the day after would retain it, which cannot have been intended.

In reality the legislation is directed to remove difficulties of proof more than to introduce a law intrinsically better. This appears from the nature of the enactment, but more distinctly from the 3rd paragraph of the 35th section, and there is as much reason for applying such legislation to the past as to the future. If in order to prove the place of settlement of the pauper as derived from the father it had been necessary to prove a derivative settlement of the father, then by the direct enactment of the 3rd paragraph of the 35th section the pauper would be deemed to be settled in the parish where he was born. But it appears from paragraph 3 of the case that the father had acquired himself a settlement in the parish of East Dean in the appellant union. The son therefore had that settlement, and, having never acquired a settlement of his own, he retained it.

We have been referred since this judgment was written to a case in the Queen's Bench Division, *Parish of Great Yarmouth* v. *Clerk of the Peace of the City of London.* (1) There is a note of the case in the Weekly Notes of the 2nd of February. The question in that case arose upon the same section, the 35th, of the Act of Parliament. But the facts were different from those of the present case, and there is nothing in the judgment, so far as can be collected from the note, in any way inconsistent with our judgment.

The order of justices will therefore stand.

Judgment for the respondents, with costs. (2)

Solicitors for appellants: *Ingledew, Ince, & Greening, for M. F. Carter, Newnham.*

Solicitors for respondents: *Scott, Jarmain, & Trass, for Frank Taylor, Barrow-in-Furness.*

(1) To be reported. (2) Leave to appeal was refused.

BODY AND ANOTHER, APPELLANTS; JEFFERY, RESPONDENT. 1878 *Feb.* 4.

Turnpike Roads—Locomotives used on Highways—Locomotive Act, 1861 (24 & 25 *Vict. c.* 70), *s.* 3—*Wheels with Shoes.*

By the Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 3, every locomotive used on a highway and drawing any waggon shall have the tires of the wheels thereof not less than 9 inches in width, and the wheels shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than 9 inches.

A locomotive was used on a highway, having the tires of the two driving-wheels 18 inches wide. Upon the tires were strips or shoes $9\frac{3}{4}$ inches in width, measured across the tire parallel to the axis of the wheel, and 3 inches broad and 1 inch thick. The shoes were placed alternately on each edge of the tire, and in the centre they touched and overlapped one another by about $1\frac{1}{4}$ inch. There was thus always a bearing surface of at least 9 inches in width on the road:—

Held, that no shoes or bearing surface would comply with the statute unless they were similar to the tires of the wheels prescribed, viz., uniform smooth-surfaced bands of the width of 9 inches at least round the whole circumference of the wheels; that these bands must be continuous and unbroken (save in so far as the joints of the material used might render perfect continuity impossible); and that the engine in question did not comply with the statute.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty session at Rye, in the county of Sussex, on the 21st of November, 1877, the appellants were charged by information alleging that on the 25th of October previous, being the owners of a locomotive engine propelled by steam power, they used it on a highway, the wheels not being constructed in conformity with 24 & 25 Vict. c. 70, s. 3. (1)

(1) 24 & 25 Vict. c. 70, s. 3: Every locomotive propelled by steam or any other than animal power, not drawing any carriage, and not exceeding in weight three tons, shall have the tires of the wheels thereof not less than three inches in width, and for every ton or fractional part thereof additional weight the tires of the wheels thereof shall be increased one inch in width; and every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than nine inches in width; but no locomotive shall exceed seven feet in width or twelve tons in weight, except as hereinafter provided; and the wheels of every locomotive shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than nine inches; and the owner or owners of any locomotive used contrary to the foregoing provisions shall for every such offence, on summary conviction, forfeit any sum not exceeding 5*l*. . . . ."

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At the hearing evidence was given by a constable and by a member of the firm of John Fowler & Co., manufacturers of the engine, and a drawing of a section of the wheel was put in, from which it appeared that the tires of the two driving-wheels were 18 inches wide. Upon the tires were strips or shoes $9\frac{3}{4}$ inches in width, from outside to inside, or in other words, measured across the tire parallel to the axis of the wheel. The shoes were 3 inches broad and 1 inch thick. They were placed alternately on each edge of the tire, and in the centre they touched and overlapped one another by about $1\frac{1}{4}$ inch. There was thus always a bearing surface of at least 9 inches in one continuous width on the road. In the opinion of the manufacturer if the shoes went straight across the wheel, leaving a space of 2 or 3 inches between each shoe, it would be of advantage to the engine on a soft road, but contrary to the Act.

It was thereupon contended for the appellants that s. 3 of 24 & 25 Vict. c. 70, had been strictly complied with, and that the wheels, although not smooth-soled, were used with a bearing surface of a width of not less than 9 inches, and that as the wheels rotated there was never less than a width of 9 inches of continuous bearing surface, because as soon as the bearing surface on one side of the wheel was exhausted it was immediately taken up by the bearing surface on the other side.

The justices were of opinion that the wheels were not constructed in accordance with the statute, and that the so-called shoes were not such as were contemplated by the Act, and were not a bearing surface with "one uniform uninterrupted line from side to side of the wheel," as laid down in *Stringer* v. *Sykes* (1), and therefore convicted.

The question for the Court was whether the determination was correct.

Jan. 29. *Sanderson Tennant*, for the appellants, contended that the wheels complied with the statute, having been made since and in view of *Stringer* v. *Sykes* (2), which decided that the 9 inches in width must be in one piece, and not made up of two; and that if the wheel was smooth-soled, or the shoes were smooth and con-

(1) 2 Ex. D. at p. 242. (2) 2 Ex. D. 240.

tinuous over the whole of the tire, the engine would not move on a hard, smooth road.

Lumley Smith, for the respondent, contended that to comply with s. 3 the shoes or other bearing surface must be (like the tires) continuous round the circumference of the wheel (for any other construction would permit cog-wheels, which would destroy the roads), and cited s. 4, which classes "shoes" with "fellies and tires."

Tennant replied.

Cur. adv. vult.

Feb. 4. The judgment of the Court (Cleasby, B., and Hawkins, J.) was delivered by

HAWKINS, J. We are of opinion that the determination of the justices was correct, and that this conviction ought to be affirmed. The sole question in the case is whether the driving-wheels of the locomotive used by the appellants upon a certain highway, rested upon such shoes or other bearings as are required by the 3rd section of the Locomotive Act, 1861. In considering this question we have derived considerable assistance from a reference to older legislation upon the same subject, to be found in the General Turnpike Acts, passed in the reigns of George III. and George IV.

By sect. 69 of the General Turnpike Act, 13 Geo. 3, c. 84, it is enacted that "the tire of the wheels of all waggons . . . . to be used upon any turnpike road shall be countersunk in placing the same upon the fellies in such manner that the nails shall not rise above the surface, and that the sole or surface of the wheels shall be quite flat." By the 2nd sect. of 16 Geo. 3, c. 39, after reciting the above provision, and that according to the strict sense of the words, that provision could not be complied with, it is enacted, "That all wheels of the breadth or gauge of 6 inches or upwards, the fellies or tire whereof shall not deviate more than 1 inch from a flat surface, shall be deemed and taken to be flat, according to the true intent and meaning of the said Act."

The 55 Geo. 3, c. 119, s. 1, authorized the trustees of roads to exempt from certain tolls such waggons, &c., as "shall have the soles or bottoms of the fellies of all the wheels thereof of the breadth of 6 inches, or of 9 inches, or of 16 inches or upwards,

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and be cylindrical, that is to say of the same diameter on the inside next the carriage as on the outside, so that when such wheels shall be rolling on a flat or level surface, the whole breadth thereof shall bear equally on such flat or level surface." (1)

The 2nd sect. of the General Turnpike Act, 4 Geo. 4, c. 95, enacts, "that the several nails of the tire or tires of the wheels of every waggon . . . . used or drawn on any turnpike road shall be so countersunk as not to project beyond one quarter of an inch above any part of the surface of such tire or tires."

Throughout these statutes will be found numerous provisions respecting the breadth or gauge of waggons, &c., using turnpike roads. When those Acts were passed, it is probable that no waggons or carriages of the weight and with the breadth of wheel of the modern locomotive, travelled upon an ordinary road.

In the year 1861, however, the use of locomotives being likely to become common on turnpike and other roads, it was deemed by the legislature necessary to make provisions for regulating the use of them, and accordingly by the 3rd sect. of 24 & 25 Vict. c. 70, the Locomotive Act, 1861, it is enacted that, "Every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than 9 inches in width . . . . and the wheels of every locomotive shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than 9 inches;" and it goes on to subject the owner of any locomotive, used contrary to the foregoing provisions, to a penalty not exceeding 5*l*.

It is clear to us that the object of the legislature in passing this enactment was to protect, as far as possible, the surface of roads travelled over by locomotives, by insisting upon the wheels thereof being cylindrical within the meaning of the older enactments; and upon the tires of the wheels being smooth-soled and of a minimum breadth or gauge of 9 inches, so that to use the language of the statute 55 Geo. 3, c. 119, "when such wheels shall be rolling on a flat or level surface the whole breadth thereof shall bear equally on such flat or level surface." The use of shoes or other bearing surface is not mentioned in any of the earlier statutes; and we have

(1) Sect. 69 of 13 Geo. 3, c. 84, is repealed by s. 1 of 16 Geo. 3, c. 39. The statutes 16 Geo. 3, c. 39, and 55 Geo. 3, c. 119, are repealed by s. 1 of 3 Geo. 4, c. 126.

no doubt that the proviso respecting them was introduced into the Act we are now called upon to construe in ease and favour of the owners of locomotives, by not insisting upon the wheels themselves being smooth-soled (which might be very inconvenient in their general use), nor upon the wheels themselves coming in contact with the surface of the road travelled over; provided they are used either with shoes, by which we understand a smooth-surfaced shoe, covering the whole surface of the tire, or, at the option of the owners, some other bearing surface of the minimum breadth of 9 inches, which shall in substance, represent a smooth-soled wheel of that width; so that when travelling along the road the substituted bearing surface as it comes in contact with the surface of the road shall produce the same even, uniform, and continuous pressure which a wheel of the same dimensions and character would produce.

In other words, we think that the legislature in permitting the use of shoes or other bearing surface, did not intend to confer upon the owners the privilege of using any but those which would produce upon the road travelled on the same pressure and effect as the wheels they had prescribed, in the event of their being used without shoes or other bearing surface. We do not think the bearing surfaces used by the appellants upon the occasion in question were such as the statute intended to allow as a substitute for smooth-soled wheels, nor do we think they would produce the same or similar pressure or effect upon the road travelled over.

In *Stringer* v. *Sykes* (1) this Court decided that the bearing surface must be of a continuous breadth of 9 inches across the wheel, and that a bearing surface of a width of 9 inches made up of two flat bars, each of the breadth of 4½ inches, but with a break between them of 3 inches, bolted obliquely across the whole width of the wheel was not sufficient to satisfy the statute, but that the statute required one uniform uninterrupted line of 9 inches from side to side of the wheel; that is, that there should be one uninterrupted pressure of 9 inches measured across the wheel. We entirely abide by that decision; and we go further, and hold that such uninterrupted pressure must be continuous throughout the whole circumference of the wheel, save in

1) 2 Ex. D. 240.

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so far as the joints of the material used may render perfect continuity impossible. For we do not intend to say that the bearing surface should, throughout the whole circumference, consist of one piece of material only; and we think that no shoes or bearing surfaces will be sufficient to satisfy the requirements of the statute unless they are similar to the tires of such wheels as the statute has prescribed, viz., uniform, continuous, unbroken (save as aforesaid), smooth-surfaced bands of the width of 9 inches at least round the whole circumference of the wheels. It is not necessary for us to pronounce any opinion as to the degree of smoothness required in the surface of the wheels, shoes, or bearing surface, nor do we intend to do so; but we may observe, that although in the early part of the reign of George III. it was enacted that so long as the fellies or tires did not deviate more than one inch from a flat surface, the wheels should be deemed to be flat according to the meaning of the Act, a deviation of a quarter of an inch only was allowed by the statute 4 Geo. 4, c. 95, and it may well be that even that deviation would not be permitted, if the question should hereafter arise whether the wheels of a locomotive are smooth-soled within the meaning of the Locomotive Act, 1861.

Our opinion being that the conviction was right, this appeal will be dismissed with costs.

Conviction affirmed.

Solicitors for appellants: *Langham & Sons, for Langham, Hastings.*

Solicitors for respondent: *Kingsford & Co., for Dawes, Rye.*

YOUNG, APPELLANT; COOK, RESPONDENT. 1877
Nov. 23.

Inland Revenue—Licence to deal in Gold Plate—Article composed wholly or in part of Gold—30 & 31 Vict. c. 90, ss. 1, 3, 5.

The term "gold," as used in 30 & 31 Vict. c. 90, which imposes a duty on licences to trade in gold or silver plate, does not mean pure gold, but a mixture of pure gold and alloy: so that a goldsmith, holding a licence on the lower scale, is liable to a penalty if he sells an article as gold which weighs more than two ounces, though it does not contain two ounces of pure gold.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43, on an information by the appellant against the respondent under 30 & 31 Vict. c. 90, s. 3 (1), for dealing in plate without a proper licence.

(1) By statute 30 & 31 Vict. c. 90, s. 1: 'In lieu of the duties now payable in Great Britain on licences to persons trading in, vending, or selling gold or silver plate, and in Ireland on licences to persons to sell or make gold or silver plate, there shall from and after the 5th of July, 1867, be charged and paid the following excise duties on licences to deal in plate to be taken out yearly in the United Kingdom, by the persons hereinafter mentioned (that is to say)—

"By every person who shall trade in or sell any article composed wholly or in part of gold or silver, in respect of every house, shop, or other place in which his trade or business shall be carried on—

"Where the gold shall be above two pennyweights and under two ounces in weight, or the silver above five pennyweights, and under thirty ounces in weight, the sum of two pounds six shillings;

"Where the gold shall be of the weight of two ounces or upwards, or the silver of the weight of thirty ounces or upwards, the sum of five pounds fifteen shillings."

By sect. 3: "Every person who shall do any act, or carry on any trade or business for which a licence to deal in plate is required by this Act, without having in force a proper licence authorizing him so to do, shall for every offence forfeit the sum of fifty pounds; and in any proceeding for the recovery of such penalty it shall be sufficient to allege that the defendant did deal in plate without a proper licence in that behalf, and it shall not be necessary further or otherwise to describe the offence."

By s. 5: "All articles sold or offered for sale, or taken in pawn, or delivered out of pawn, and alleged to be composed wholly or in part of gold or silver, shall for the purposes of this Act, be deemed and taken to be composed of gold and silver respectively as alleged; and if upon the hearing of any information for any offence against this Act any question shall arise touching the quantity of gold or silver contained in any article, the proof of such quantity shall lie upon the defendant."

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The following facts were proved or admitted. The appellant an officer of excise, went to the shop of the respondent, who carried on business as a jeweller, and bought a guard chain which was offered for sale and sold as a gold chain, and weighed 2 ozs. 11 dwts. 10 grs.

The respondent had in force a licence to deal in plate, taken out by him under 30 & 31 Vict. c. 90, in respect of his shop, for which he paid the sum of 2*l.* 6*s.* The amount of pure gold contained in the chain was less than two ounces. On the part of the appellant it was contended that, inasmuch as the chain in question, as offered for sale and sold, was alleged to be a gold chain, it must under the provisions of 30 & 31 Vict. c. 90, s. 5, be taken to be composed of gold as alleged; that no question could arise under that section touching the quantity of gold contained in an article alleged to be gold; and that as the weight of the gold chain was proved to be two ounces or upwards, the sale thereof was not authorized by the licence granted to the respondent at the lower rate of duty; and that the respondent not having in force a licence at the higher rate of duty had incurred the penalty of 50*l.* named in the 3rd section of the Act.

On the part of the respondent it was contended that as the article in question contained less than two ounces of gold, he was properly licensed under the Act, and that he had not incurred the penalty mentioned therein.

The magistrate dismissed the information. The question for the opinion of the Court was whether the actual weight of the articles, or the weight of the pure gold contained therein, is to be taken as the proper test for assessing the licence duty.

C. Bowen, for the appellant. The standard of gold has been altered at various times, and now in pursuance of 17 & 18 Vict. c. 96, there are five proportions of gold and alloy which may be used. The last statute, 30 & 31 Vict. c. 90, in view of this variety, and the consequent difficulty of determining the amount of pure gold, treats any of these mixtures of gold and alloy as "gold," that is, as what is commercially known as gold. The 1st section, which speaks of articles composed wholly or in part of gold, should be read as referring to articles either wholly of gold of any lawful

standard, or to articles partly of such gold and partly of some substance (other than alloy) in respect of which a licence is not necessary, and the same meaning must be attached to the word "gold" in the 5th section. The respondent has therefore sold an article alleged to be composed wholly of gold, and no question can arise touching the quantity under the latter part of the section, which is only applicable to articles partly of gold and partly of some other material.

Anstie, for the respondent. The tradesman is entitled to shew that the actual quantity of gold in the article sold by him did not exceed the amount covered by his licence, by shewing the extent to which it was alloyed. This is a necessary implication from 30 & 31 Vict. c. 90, s. 1, and the words of the latter part of s. 5, taken in their most obvious and natural sense; and the history of the legislation on the subject shews that it was so intended.

The standard of gold was raised in the reign of Elizabeth (1576) by royal proclamation to 22-carats; and the same standard was afterwards fixed by the Act of 12 Geo. 2, c. 26. This is still the standard of fine gold and of the coin; but by 38 Geo. 3, c. 39, a second standard of 18-carats was permitted. From the time when the duties on the manufacture (6 Geo. 1, c. 11) and afterwards on the sale of plate (31 Geo. 2, c. 32) were first imposed, until after the introduction of the double standard, no provision relating to the proof of the weight of gold in articles sold is to be found in the Acts which created and from time to time varied those duties, although ever since 32 Geo. 2, c. 24, the amount of licence has varied with the weight of the articles sold under it. But after the admission of the double standard the question now raised appears to have arisen, and was met by 59 Geo. 3, c. 32, s. 3, which enacted that any article sold as gold should be deemed to be gold; and this enactment was repeated in 6 Geo. 4, c. 118, s. 3. The difference between the two standards was not considerable; but by 17 & 18 Vict. c. 96, s. 1, other standards were admitted, going so low as one-third gold and two-thirds alloy; and in pursuance of that statute standards of 22, 18, 15, 12, and 9-carats are now in use, and articles of the various standards are distinguished by appropriate hall-marks. The quantity of pure metal therefore

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in articles of the same weight described as "gold," now varies greatly. Accordingly, 30 & 31 Vict. c. 90 by Sched. A. repeals 59 Geo. 3, c. 32, s. 3, and 6 Geo. 4, c. 118, s. 3, and in s. 5 substitutes for the repealed sections provisions which raise only a primâ facie presumption against the seller that the article sold is of fine gold, but enable him to prove the real quality by means of the impressed hall-mark.

C. Bowen, in reply.

KELLY, C.B. In this case I think that the respondent was subject to the higher duty, and has rendered himself liable to a penalty.

The facts of the case appear to be simply these, that the respondent is a goldsmith and jeweller, and he dealt, amongst other articles, in gold chains. On the day in question, the appellant went into the shop and asked for a gold chain, and a chain was produced by the respondent and described as a gold chain in what passed between the parties, and the price of the chain being paid, it was accordingly delivered over to the purchaser as a gold chain. It appears that the weight of that gold chain, or in other words the quantity of gold, according to the construction which I am disposed to put on the 5th section of the Act of Parliament, was upwards of two ounces. If the respondent deals in an article of gold exceeding in weight two ounces he is liable to the higher duty, and the question is whether, as it appears that the chain, if analysed, would be found to contain much less of pure gold than two ounces, that entitles the respondent to carry on his business as a goldsmith and jeweller under the lower licence, which applies only to the dealing in gold articles where the gold is less in quantity than two ounces. The question arises on the 1st and 5th sections of the Act. It appears to me the word "alleged," in the 5th section, is an unfortunate word, and tends, upon the first view of the language of this clause, to mislead; because there is, strictly speaking, no allegation; but it must be taken to mean what would have been more properly expressed by the word "described." Taking the first part of the 5th section by itself, it would appear that this chain was described by the seller, the respondent, to be a gold chain, and so must be taken to have been composed of gold,

and if composed of gold, as there was more than two ounces in it, he is liable to the higher licence.

But the 5th section continues: "If, on the hearing of any information for any offence against this Act, any question shall arise touching the quantity of gold or silver contained in any article, the proof of such quantity shall lie upon the defendant;" and with reference to what is contained in the first section of the Act of Parliament, it is said that must mean the quantity of pure gold, and so the case would come within that provision, since a question did arise in this case whether the quantity of pure gold contained in the chain was not less than the weight of two ounces. Reference is made to the first section to support this view, and it is said that the meaning of the expression, "every person who shall trade in or sell any article composed wholly or in part of gold" (leaving out altogether anything about silver), is "every person who shall trade in or sell something wholly of pure gold or in part of pure gold and of alloy." But that is not so. The meaning is quite obvious; every article of commerce which is sold in a goldsmith's or jeweller's shop, whether it is represented and sold as gold or represented and sold as silver, is known to be composed in part only of pure gold or pure silver. Thus the meaning is not that the use of the word "gold" in any part of the Act, or the use of the word "silver" in any part of the Act, means pure gold or pure silver, but merely what is ordinarily called gold or silver. This is quite consistent with the 5th section, for the question that may arise on the hearing of an information is not as to what is pure gold or pure silver in any article sold, but what is the quantity of what in common parlance is called gold or silver used in the construction of the article; so that in the case before us no question arises under the latter part of the 5th section. I do not see how any question can arise under this Act as to how much of pure gold there is in an article, or how much of pure silver. The question that may arise is merely what is the weight of gold in an article which is sold, or what is the weight of silver in an article which is sold, and accordingly whatever appears to be, in common parlance, gold or silver, subjects the vendor to the lower duty or the higher, according to its weight.

Under these circumstances, I think the respondent was liable

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to the higher amount of duty, and the case will be remitted with our opinion.

CLEASBY, B. I am myself clearly of the same opinion. This act relates to persons carrying on trade in gold and silver plate, who are liable to duties, and has to do with the matter of granting licences to such persons, and has no relation to refiners who are engaged in procuring pure gold from the ore, and to persons of that description.

Now the first section after the enacting part of it provides for the case of persons dealing in gold plate, which includes articles composed wholly or in part of gold, and the duty is 5*l.* 15*s.* if the gold is over the weight of two ounces. Now what is the meaning of the word "gold of the weight of two ounces," which imposes the necessity of paying the higher duty. I think it undoubtedly signifies taken by itself, not pure gold which is commercially unknown, but gold with whatever alloy there is in 22, 18, 15, or 9-carat gold, or whatever it might be. But the 5th section is introduced for the purpose of removing the difficulties of proof that might exist as to an article which was of gold wholly or in part. If you describe an article as wholly or in part consisting of gold, it is to be taken to be gold for the purposes of this Act as alleged. "For the purposes of this Act" means for the purpose of ascertaining what should be the proper duty payable by the person for his licence. No doubt, therefore, it is a duty payable on an article sold as gold, imposed upon persons dealing in that article where there is more than two ounces. There the case is complete. Now that was not disputed by the learned counsel, and he could not dispute it if you read the Act of Parliament only up to the middle of the 5th section, but he says the necessary effect of the subsequent part of the 5th section is to give a different meaning, and to shew that in estimating the quantity of gold for the purposes of this Act, which is dealing entirely with a commercial matter, you must take the quantity of pure gold, difficult as it is to get at it. Nothing could be more inconvenient, indeed it might be next to impossible, unless by pulling to pieces each piece of work about which there was a question. Still those words cannot be eliminated from the Act of

Parliament, and if no effect can be given to them except by reading, in that particular clause, the word gold to mean pure gold it must be so read. But there is really no necessity for that whatever; articles sold as wholly or in part consisting of gold shall be taken to be gold as alleged. If a man sells an article composed partly of gold and partly of silver, for instance, a silver racing cup with a gold horse attached, and there is a duty payable in respect of the gold, when you come to consider whether there are two ounces of gold or not, how is that to be ascertained? The revenue authorities say there are more than two ounces of gold in this horse at the top, and the seller says there are less. If there are more he must pay the higher duty, if less the lower. You cannot break the thing to pieces and weigh the particular parts, therefore it is provided that you who sell, who have the means (if you had bought it from the manufacturer you would not perhaps have the means, but generally speaking you have the means) of proving the amount of gold there is, shall have the burden of proof upon you. That seems to me to be pretty clearly the sort of case to which that part of the section applies, and I do not find any difficulty, such as the learned counsel insisted upon, in that part of the section.

Case remitted with the opinion of the Court in favour of the appellant.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Layton & Jaques.*

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Dec. 6.

THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA *v.* WILSON.

Revenue—Inhabited House Duty—14 & 15 Vict. c. 36, s. 1—Building occupied for purposes of Trade only—Telegraph Company—57 Geo. 3, c. 25, s. 1—5 Geo. 4, c. 44, s. 4—32 & 33 Vict. c. 14, s. 11.

A banking company carried on their business on a part of their premises, and let off the remainder to a telegraph company, with the exception of two rooms occupied by a caretaker, who looked after the whole premises. The banking company having been assessed to the inhabited house duty in respect of the whole building:—

Held (by Kelly, C.B., and Pollock, B.), that the business of a telegraph company is a trade within the meaning of 57 Geo. 3, c. 25, s. 1, and that as the whole of the premises were occupied for purposes of trade only they were exempt under 32 & 33 Vict. c. 14, s. 11:

Held, contrà, by Cleasby, B., that the provisions of 32 & 33 Vict. c. 14, s. 11, apply only to premises occupied for the purposes of trade within 57 Geo. 3, c. 25, s. 1, and not to premises used as offices or counting-houses for any profession, vocation, business, or calling within 5 Geo. 4, c. 44, s. 4; that the business of a telegraph company was not a trade within the meaning of the former Act, and that the premises were not exempt. (1)

Case stated under 37 Vict. c. 16, s. 9, by commissioners for executing the Acts relating to inhabited house duties, on appeal against an assessment to the inhabited house duties for the year

(1) 57 Geo. 3. c. 25, s. 1, after reciting that duties on inhabited houses were granted by 48 Geo. 3, c. 55, sch. B., enacts: "And whereas it is become usual in cities and large towns and other places for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house or dwelling-houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the day-time only for the purposes of such trades respectively, which have been charged with the said recited duties, although no person shall inhabit or dwell therein in the night-time; and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes herein mentioned, be it therefore enacted . . . . that from and after the 5th day of April, 1817, on due proof made in the manner herein directed to the satisfaction of the respective commissioners acting in the execution of the said recited Act, that any person or any number of persons in partnership together respectively occupy a tenement or building, or part of a tenement or building, which shall have previously been occupied for the purpose of residence wholly, as a house for the pur-

ending the 5th of April, 1874, of 5500*l.*, being the full value of the appellants' premises.

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pose of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein, except in the day-time only, for the purpose of such trade, such person, or each of such persons in partnership respectively, residing in a separate and distinct dwelling-house, or part of a dwelling-house, charged to the duties under the said Act, it shall be lawful for the said commissioners, according to the provisions of this Act, to discharge the assessment made for that year in respect of such tenement or building which shall be so used for the purposes of trade, or so employed as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, anything in the said Act to the contrary notwithstanding."

5 Geo. 4, c. 44, s. 4, enacts: "And whereas by an Act passed in the 57th year of his late Majesty's reign provision is made for the granting exemptions to persons in trade from the duties on houses, windows, and lights, and on inhabited houses, in respect of houses, tenements, or buildings, or parts of tenements or buildings, used solely by such persons for the purposes of trade, such persons respectively residing in a separate and distinct dwelling-house, or part of a dwelling-house, charged to the said duties as in the said Act described: And whereas it is expedient to extend the said exemptions to the case herein mentioned, Be it further enacted that upon all assessments to be made for any year commencing from and after the fifth day of April, 1824, the provisions in the said Act contained for granting exemptions from the said duties to persons in trade in respect of houses, tenements, or buildings in the said Act described, shall and may be extended and applied by the respective commissioners and officers acting in the execution of the said Act and of this Act on due proof, to all and every person, or any number of persons in partnership together, for and in respect of any house, tenement, or building, or part of a tenement or building, in the said Act described, which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling by which such person or persons shall seek a livelihood or profit, no person inhabiting, dwelling, or abiding therein, except in the day-time only, for the purpose of such profession, vocation, business, or calling, such person or each of such persons in partnership respectively residing in a distinct and separate dwelling-house, or part of the dwelling-house, charged to the said duties; provided, nevertheless, that the exemption herein authorized shall not extend to any chamber or apartment in any of the Inns of Court or of Chancery, or to any college or hall in either of the universities of Oxford or Cambridge, now chargeable with any of the said duties; and the said exemptions hereby authorized shall be claimed and allowed on due proof, and the assessments thereupon discharged, by the same rules and in like manner and form as are allowed by by the said Act to persons in trade . . . ."

32 & 33 Vict. c. 14, s. 11, enacts that "from and after the 5th day of April, 1869, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a ware-

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The premises, Nos. 65 and 66, Old Broad Street, consist of basement and ground floor, and of upper floors, running over a portion of the premises. There are two separate main entrances from the street, one in Old Broad Street and the other in Austin-friars. The entrance to the portion of the premises known as No. 66 is in Austin-friars. There is a lobby on the ground floor, containing a staircase leading to the first and upper floors, and a staircase leading to the basement. The premises No. 66, comprise the basement under this lobby, the lobby itself, and the whole of the first and upper floors. The entrance to No. 65 is in Old Broad Street, and the premises consist of the remainder of the ground floor and basement. The basements of Nos. 65 and 66 are completely separated by brick walls, and approached by separate staircases.

The premises No. 65 are in the occupation of the appellants and used by them as a bank, and for the purpose of carrying on their business as bankers.

The premises No. 66 (with the exception of two rooms on the third floor, occupied by a caretaker employed by the appellants, who resides there with his wife for the protection of the entire premises), are let to the Eastern Telegraph Company, Limited, and are occupied by them solely for the purpose of carrying on their business. The whole of the orders for the management of the business of the company are issued from these premises, and all the accounts between the company and their customers, and between the company and their own shareholders, are kept on such premises.

With the exception of the caretaker and his wife, no person sleeps on any portion of the premises No. 65 or No. 66.

The entrance to No. 65 from Old Broad Street, opens into a lobby, through which is the access to the appellants' bank premises. The only internal communication between No. 65 and 66 is through this lobby.

The regular entrance to the premises of the telegraph company

house for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof."

is by the door from Austin-friars, but during banking hours some iron doors between the lobby to No. 65 and that to No. 66 are allowed by the appellants to be open, so as to give the Eastern Telegraph Company access to their premises from Old Broad Street, which is to some persons more convenient than the entrance from Austin-friars. At the close of the bank business of the day, these iron doors are, with the entrance to No. 65, from Old Broad Street, closed and locked by the bank porter, who keeps the keys of both doors, and when this is done the bank premises are completely shut off from the rest of the building, and the only approach to the premises No. 66 is from Austin-friars.

In the valuation list made for the city under the Valuation (Metropolis) Act, 1869, in the year 1870, the premises were valued as one building, and were thenceforth, until 1875, rated to the poor as one building; but upon the appeal of the appellants against the new valuation list made in the year 1875, the assessment has been divided, and Nos. 65 and 66 are now separately assessed and rated to the poor.

The appellants contend, first, that no part of the premises form an inhabited dwelling-house within the meaning of 14 & 15 Vict. c. 36, s. 2, and that, even if they do, they would still be exempt under the provisions of 32 & 33 Vict. c. 14, s. 11, inasmuch as they are used for the purposes of trade only.

Secondly, that the bank premises are occupied for the purpose of trade only, and that they are so structurally severed from the rest of the building as to be a different tenement for rating purposes; and that, even if the premises in the occupation of the telegraph company are not exempt, and are not occupied as trade premises within the meaning of this statute, yet the assessment is wrong, inasmuch as the whole of the premises are rated therein.

Thirdly, that whether this is so or not the assessment was bad, as being to the full value, although a part of the premises were in the occupation of the appellants for purposes of trade only.

The commissioners confirmed the assessment, and the question for the opinion of the Court was whether the commissioners were right in so doing.

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F. M. White, Q.C., for the appellants. The first question is whether this building is one house or two. If the building consists of two distinct houses, as the appellants allege, the assessment is wrong on the ground that the appellants are assessed for the whole. The case differs from that of *Attorney-General* v. *Mutual Tontine Chambers Association* (1), for here there are two separate basements and two separate street entrances. The only circumstance which seems to make against this contention is, that there is a means of communication between the two houses which is not always shut, but this alone does not alter the whole character of the building. Further, whether the building is one or two houses, the telegraph company occupy for purposes of trade only, and as the whole of the premises are so occupied, the presence of a caretaker does not affect the exemption given by 32 & 33 Vict. c. 14, s. 11. The telegraph company is a commercial undertaking, and as much a trading partnership as a banking company. They certainly are as much traders as carriers who are included in the Bankruptcy Acts. The expression "trading" is not necessarily confined to mere buying and selling goods and merchandise.

Sir Hardinge S. Giffard, S.G. (*Dicey* with him), for the Crown, was directed to confine his argument to the question whether the telegraph company are traders. Trade involves of necessity the idea of buying and selling, and the expression "trade" is something different from "business," "vocation," or "employment." It cannot now be disputed that London bankers are traders, but one portion of their business is to buy and sell bills. Carriers are only made traders by Acts of the present reign for purposes of bankruptcy, independently of any consideration whether they ought otherwise to be so described. "Buying only or selling only did not at common law qualify a man to be a bankrupt, but it must be both buying and selling, and also getting a livelihood by it. . . . Also an innkeeper cannot as such be a bankrupt, for his gain or livelihood does not arise from buying and selling in the way of merchandise": Blackstone, Commentaries, vol. ii. p. 476. A dyer is not a trader, though modern Bankruptcy Acts make him liable as such. In *Edinburgh Life Assurance Co.* v. *Solicitor*

(1) 1 Ex. D. 469.

of Inland Revenue (1), it was held by the Court of Session that a life assurance company are not traders.

F. M. White, Q.C., was not heard in reply.

KELLY, C.B. In the present state of the argument we think we are justified in at once pronouncing our judgment. With regard to the question which has been argued for the appellants, but not on behalf of the Crown, I might, independently of the authorities, be disposed to entertain some doubts whether this was really to be deemed one tenement; but my learned brethren are decidedly of opinion that it is to be deemed one tenement, and, looking to the authorities, I do not feel disposed to differ, and therefore, upon that point, the judgment of the Court is in favour of the Crown.

With regard to the question whether this tenement, which is in the occupation of the telegraph company, is to be deemed to be a house occupied for the purpose of trade only, I am clearly of opinion that it is. The main ground upon which I found that opinion is that we are bound to put a large and liberal construction upon any provisions in any Act of Parliament, where the construction proposed to be put upon it is in favour of the trade and commerce of the country. Undoubtedly, if we are to take the terms "for the purposes of trade" as relating only to the business of buying and selling, no one can say that there is any buying or selling in carrying on the business of a telegraph company. It was never the intention of the legislature so to limit the meaning of the word "trade." It is not only the literal meaning of the word which is to be regarded. In literature of all descriptions, both in prose and verse, we find that the word "trade" is often used in a much more extensive signification than to indicate merely the operation or occupation of buying and selling. Why are we so to limit it in a case of this nature? I cannot feel any doubt but that really the object of the legislature was to protect the commercial business of the country. Whatever might be the precise nature of the occupation, if it was one which was practised for the commercial benefit of the country, it was

(1) 12 Scot. Law Rep. 275; and Cases in the Court of Session, 4th Series, vol. ii. p. 394.

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intended to exempt those operations from the liability to this tax. We find the expression does not stand alone, but that the section also says "part of a tenement occupied as a house for the purposes of trade only." That is the first exemption. Then comes this, "or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein." Now I apprehend that throughout a very great portion of the commerce of the country, not only in the city of London and in the metropolis, but in all the great commercial towns of this country, a warehouse is the scene of larger and more numerous commercial operations than any other description of building. There may well be warehouses where there is nothing like buying and selling, but where goods are deposited, and there may be persons who may be traders in other respects, and who likewise carry on that business independently of their own particular trade, and when we find the example given in the next provision, "a warehouse for the sole purpose of lodging goods, wares, and merchandise therein," and where there is, therefore, nothing like buying and selling referred to or at all pointed at, I think we may apply the maxim "Noscitur a sociis," and apply the earlier provision about a house used "for the purposes of trade only" in the same way as the provision which next follows, namely, the provision respecting warehouses, where there is nothing like buying and selling carried on, and which has been adopted and given as an example by the legislature. We then come again to the shop or counting-house. Now a shop undoubtedly is a place in general in which nothing is carried on but buying and selling. I say "in general," because it is not always so. I have heard the expression repeatedly, and we find it in books, and must often have heard it in conversation, that a banker's is a "shop," the "banking shop of a bank," and there, again, there is nothing like buying and selling as generally understood, but it is a trade or business of a description quite sui generis, and certainly quite apart from what is generally understood by buying and selling. But a counting-house is a building or apartment in which every description of commercial business is carried on; a tradesman doing any large amount of business has, independently of his shop, a counting-house in which the counting-house business of the concern is carried on, merchants have it who

live by buying and selling, and, in fact, almost every man of business has something like a counting-house in which he carries on his business or a portion of his business.

I think, therefore, applying the maxim "noscitur a sociis," we may reasonably infer that the legislature never intended by the use of this word "trade" to limit the business which is to exempt the occupier of the tenement from the tax in question to mere buying and selling. We may reasonably say that it was intended to embrace a great variety of different operations, though all of a commercial character, something therefore like a warehouse, like a shop, like a counting-house, all which expressions are to be construed, in my opinion, upon the same principle, namely, by putting a large and liberal interpretation upon the exemption which the legislature has provided for persons, whatever may be the precise occupation or vocation which they follow, who carry on, or assist in carrying on, the commercial business of the country. I have only a word to say about the Scotch case which has been cited. I receive with great attention every decision we hear of in the Court of Session in Scotland, but when we consider that the judgment of the learned judges in that case related to a life assurance company, I cannot think the authority in question has any bearing upon the present case. The difference is substantial in every way; a life assurance company in one sense may be said to be a commercial undertaking, but on the other hand, it is one of a very peculiar character, and indeed of a very limited character; it is an agreement or contract which is made between one man and another, or between an individual and the company, that in consideration of an annual payment during his life the executors of the one party shall at his death become entitled to a particular sum of money. I do not know that there is anything of a commercial nature in a transaction of that kind. It is quite different from the business of a telegraph company. I content myself, therefore, with saying that, in my opinion, the difference is so manifest, both in principle as well as in fact, in the nature of the operations in question between those of a telegraph company and those of a life assurance company that I do not consider the case in Scotland at all applicable to the case which is now before the Court. Under those circumstances

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it appears to me that the appellant is entitled to the judgment of the Court.

CLEASBY, B. I confess I think that judgment ought to be given for the Crown, although I deemed it quite unnecessary to have any further argument, because we are all agreed upon the question which the learned Solicitor-General has not dealt with. As to that question, I do not entertain any doubt that these premises are to be regarded, for the purpose of applying the law of inhabited house taxation, as an inhabited house. It is a question of considerable difficulty when looked at by itself, but it has really been considered and decided already. The question of a part of a tenement was particularly considered in *Rusby* v. *Newson* (1), and I endeavcured to point out in that case, although I am afraid I did not do so as clearly as I might have done, at all events it does not appear so on reading the report, that 57 Geo. 3, c. 25, and 32 & 33 Vict. c. 14, when they speak of a part of a tenement, refer to part of a tenement which might have been taxed as an inhabited house. That is the only explanation, in my opinion, of the term "part of a tenement;" we must read it with the recital of 57 Geo. 3, c. 25, from which it appears that it must be part of a tenement which was the subject of taxation as an inhabited house. Now in this case the great feature is that there is a common entrance during the day. The tenant has a right to go through the entrance of the bank to his premises during the day, and he has a right to put his plate upon the door of the bank, giving a character of unity as it were to the whole; but still more, there is one person living in one part, that is, the telegraph part, who has the care of the whole. Those circumstances give to this tenement the character of one house, and in a way which certainly has not occurred in any case which has been decided.

Now we come to the next part of the case, and after what I have heard from my Lord, I cannot say that I come to the same conclusion. I quite agree that the Scotch decision is not upon the same facts as the present case, because I can see a considerable distinction between an insurance society and a telegraph

(1) Law Rep. 10 Ex. 322.

company, but it appears to me that the principles laid down in that case are quite correct, and that if they are applied to the present case we should come to the conclusion that the telegraph company does not come within the exemption of the section. It is necessary, however, to go back to the history of the legislation upon the subject in order to see how I arrive at this conclusion, because it is to a certain extent a system of legislation, and one part of it should not be taken alone without regard to the next. I will begin taking the Solicitor-General's suggestion that every house that is occupied is an inhabited house; then there is an exemption made by 57 Geo. 3, c. 25, and the importance of referring to this arises from the fact that the language there used is the same as the language of 32 & 33 Vict. c. 14. This enactment having been made and acted upon was felt to be a grievance to a certain class of persons who did not occupy premises for the purposes of trade, but who occupied premises for the purpose of some employment by which they gained their livelihood. This led to the enactment of 5 Geo. 4, c. 44, s. 4, which extends the provisions contained in the Act of Geo. 3, for granting exemptions from the duties to persons in trade, to "all and every person, or any number of persons in partnership together, for and in respect of any house, tenement, or building, or part of a tenement or building in the said Act described, which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling by which such person or persons shall seek a livelihood or profit." There is, therefore, in reference to this particular subject of taxation a clear distinction drawn between premises occupied for the purposes of trade, or as warehouses, or counting-houses, or shops, and premises which are occupied as offices or counting-houses for the purposes of carrying on any business of profit. That is the way in which the law stood until we come to the Act of 32 & 33 Vict. c. 14. The prior Act did not allow any person to sleep on the premises at all; they must be upon the premises by day only. When the enactment took place which we are now considering, whether intentionally or unintentionally it is not for me to say, the enactment is made to apply only to those premises mentioned in 57 Geo. 3, c. 25, and it is not made to apply to those

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matters enumerated in 5 Geo. 4, c. 44, exempting persons who use offices or counting-houses for the purpose of carrying on any business whereby they obtain a livelihood. The language of the section which I am now considering is precisely the same as the language of 57 Geo. 3, c. 25, with the exception of the addition at the end, which I do not think can have any bearing upon the present question, "or being used as a shop or counting-house," in addition to the words, "occupied as a shop or counting-house." It was upon this difference that the Scotch case proceeded, seeing that the legislature had drawn a distinction between premises used for the purposes of trade and offices or premises occupied for the purposes of carrying on any vocation or business. There are the Acts of Parliament, and there is a distinction made, and there is nothing whatever to repeal it, and I should feel myself departing from the distinction which the legislature itself has pointed out, if I were to say that these premises, which would no doubt come within 5 Geo. 4, c. 44, as being offices for the purpose of carrying on business, were offices or premises occupied for the purposes of trade only. By so holding I think we should say there is no distinction between the two, whereas the Act of Parliament says there is. I cannot bring myself to regard telegraphy as a trade. It would be, in my opinion, departing entirely from the ordinary and recognized meaning of the word "trade," to hold that premises occupied either by individuals, or by a company, or by the government, for the purpose of telegraphy, were occupied for the purposes of trade. They would no doubt be occupied for the purposes of carrying on a business of profit within 5 Geo. 4, c. 44, s. 4, but not for the purposes of trade. These offices of the telegraph company would be exempt from taxation as an inhabited house if no person slept there by night, and if they were only used by day; but if a person does sleep there by night, they do not come within the words of this exemption. For these reasons I think the Crown is entitled to our judgment.

POLLOCK, B. In my judgment the appellant is entitled to our judgment, and inasmuch as there is no difference of opinion or any reasonable doubt, after so many decisions upon the same subjects, with regard to the character of the premises, I think it

will be quite sufficient for me to give my reasons for agreeing with my Lord upon the question of whether or not this telegraph company can be said to be using these premises for the purposes of trade. Now no precise description of the business of this company is given to us, and therefore there is something left, although not much that is material, for us to infer as to what is the nature of the business. The company are described in the case as a telegraph company, limited. It is said that these premises are occupied by them solely for the purpose of carrying on the business of the company. The whole of the orders for the management of the business are issued from the premises so occupied by the company, and all the accounts between the company and their customers, and between the company and their shareholders are kept on such premises. Now, as I understand the business of a company like that, they have not merely to transmit by electric apparatus messages from one part of the world to the other, but they have also to do all those things which are conditions precedent to their doing so, in the way of acquiring machinery and telegraphic communication by wires and cables, and arrangements for the repairs of their cables, involving either the direct purchase of the materials or the entering into contracts for their repair by others who do purchase those materials, and they have also to keep up correspondence and communication with many parts of the world, receiving money and paying money, and having clerks who keep their accounts. Now that being so, is this business which is carried on by them such that they can properly be said, within the meaning of this Act, to occupy these premises for the purposes of trade? There is a rule for the construction of statutes which is well expressed in Maxwell on the Interpretation of the Statutes, ch. 2, s. 1: "In interpreting a statute it is to be borne in mind at the outset that language is always used secundum subjectam materiam, and that it must therefore be understood in the sense which best harmonises with the subject-matter." That, I think, is a very good and a very clear proposition. Now that being so, what was the subject-matter of this statute, and what was the spirit of the distinction to be created? It was a distinction between persons who inhabited houses for the purpose of residence, and persons who occupied "houses," as they were then called, for the purposes

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of trade, and you find coupled with the word "trade," as my Lord has said, such places as warehouses for lodging goods, wares, and merchandise therein, or shops or counting-houses. If it is for me to choose between the rules of construction, I would rather prefer the construction adopted by my Lord than that which has been adopted by my Brother Cleasby in the construction of the latter statute. Some citations were made in the course of the argument from dictionaries, and I would only say that I would personally avoid citing any word from dictionaries as implying in any sense a definition, because that is dangerous, but one may cite from a dictionary, or a work of good repute, to see what is the common acceptation of a word. Richardson's and Webster's dictionaries were cited for the purpose of giving us a definition of the term, but I have found a definition in Johnson's which seems to me to be more near the spirit in which I am construing the words. It is the second meaning which he gives, in which trade is described as an "occupation; particular employment, whether manual or mercantile, distinguished from the liberal arts or learned professions." That is a very fair expression of the meaning of the word in common parlance, when you are speaking of whether a person exercises a profession or whether he carries on trade; and in the same way, whether a person occupies a house for the purpose of dwelling therein personally, or whether he occupies it for the purpose of carrying on a trade.

Now another head of argument, and one of course to which we ought to attend with the greatest care, is that which is used by the learned Solicitor-General in regard to the Bankruptcy Acts, and no doubt the word trade was originally there intended as applying only to persons who either bought or sold, or whose business was immediately cognate to the buying or selling of goods, but even then we find from time to time the words used in a much wider sense; and although we have no right to refer to the enlargement of the number of persons who have been made liable to become bankrupts by different statutes from time to time, we may look at these statutes to see in what sort of sense they used the words themselves. I find in one statute, as far back as James I., that a scrivener may be bankrupt. In 21 Jac. 1, c. 19, s. 2, the words used are, "Or that shall use the trade or

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profession of a scrivener, receiving other men's moneys or estates into his trust or custody." Therefore even there you find the word used in a wider sense than that of mere buying or selling. And in Christian's Bankruptcy Law you find thirty or forty pages devoted to considering all the different cases in which, apart from the statute law, persons have been made bankrupts who have not actually been traders in the limited sense of buying, selling, or bartering. I do not think, however, that that is a true guide to our conclusion in this case. I would rather say that, although the statutes relating to bankruptcy present some analogy, they do not present a true analogy, because they were devoted to a very different purpose from that which was the object and intention of the statute which is now under our consideration. Upon these grounds I think the appellant is entitled to our judgment.

Judgment for the appellant.

Solicitors for appellant: *Clarkes, Rawlins, & Clarke.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

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Feb. 4.

WOODWARD *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Carriers Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *s.* 1—*Painting or Picture—Painted Patterns and Designs.*

The word "paintings" in the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), s. 1, is used in its ordinary and popular sense to denote works of art.

Coloured imitations of rugs and carpets and coloured working designs, each of them valuable and designed by skilled persons and hand painted, but having no value as works of art:—

Held, not to be paintings within the Carriers Act.

THIS was an action to recover the value of certain goods lost through the negligence of the defendants.

At the trial before Cleasby, B., at the Easter sittings in London, 1877, it appeared that the plaintiff was a traveller by the defendants' line of railway, and he had with him three packages which were placed in the luggage-van. One of these was lost on the journey. It contained a number of carpet and rug patterns and carpet designs, designed and painted by hand by

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skilled persons, and varying in value up to 6*l.* or more each, according to the character of the design and the amount of time and skill expended in producing it. The principal defence was, that these articles were paintings within the Carriers Act, and that their value, which in the aggregate was considerable, had not been declared. (1) The learned judge left it to the jury to say if the articles were paintings within the Carriers Act; the jury found that they were not, and returned a verdict for the plaintiff for 14*8l.*

A rule was obtained for a new trial on the ground of misdirection, and that the verdict was against the weight of the evidence.

Jan. 14. *Staveley Hill, Q.C.*, and *W. Graham*, shewed cause.

(1) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, provides: "Whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels, and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased; and whereas, through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: Be it therefore enacted, that from and after the passing of this Act no mail contractor, stage-coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the description following (that is to say) . . . paintings, engravings, pictures . . . contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Grantham, Q.C., and *English Harrison*, in support of the rule.

Cur. adv. vult.

Feb. 4. CLEASBY, B. The only question in this case was, whether certain painted carpet and rug patterns and painted carpet designs were paintings or pictures within the Carriers Act, 11 Geo. 4 and 1 Wm. 4, c. 68.

The plaintiff, a carpet manufacturer, was a passenger by the defendants' railway, and had with him a parcel containing articles of the above description beyond the value of 10*l.* The parcel was lost, and as the value had not been declared and an increased charge paid, the question was whether the defendants could avail themselves of the protection of the Act, in other words, whether the patterns or designs were paintings or pictures within the Act.

The nature and character of the articles were proved at the trial, and specimens of them were produced. There were some differences between the patterns or models and the designs, and if we thought that one class was within the Act and the other class not, there are materials for entering the verdict or giving judgment accordingly. But as our conclusion is the same as regards them all, it is unnecessary to dwell upon any difference.

It appeared from the evidence that the models were coloured imitations of rugs and carpets painted by hand, and that they were of considerable value, some as much as 6*l.* each, and further, that the value of them depended upon the labour bestowed upon them and the standing in the trade of the person who did them. The coloured working designs were also of considerable value, some of the value of 6*l.* each.

There was no arrangement made to reserve the question for the decision of the judge or the Court, and as the question is properly one of fact for the jury, as was laid down by this Court in the case of *Brunt* v. *Midland Ry. Co.* (1), and in other cases, the question was left to them, and they considered that none of the articles were within the Act, and the verdict was given for the full amount, 148*l.* It seems impossible to regard the question as one of law for the judge to decide, where everything depends upon the effect of the evidence given as to the nature and character of the article, and

(1) 2 H. & C. 889; 33 L. J. (Ex.) 187.

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how it is made, all which may be left in uncertainty, and possibly with contradictory evidence. So far as the construction of the statute goes, it must of course be for the Court; and if there was anything in the Act itself to shew that a particular meaning must be given to the word "painting," as distinct from its natural and ordinary meaning, the jury in deciding the question should have had that pointed out to them. But the only remark to be made upon the language of the statute, as affecting the meaning to be given to the word "paintings," is that the other matters mentioned in connection with it, "engravings, pictures," shew that the statute cannot be construed as meaning everything which has painting done upon it by a workman, it must mean something of value as a painting (value being necessary to make the statute applicable), and something on which skill has been bestowed in producing it. But although the question is, strictly speaking, for the jury, it is a question of fact of such a nature that the Court would feel justified in dealing with the verdict as one on a particular subject, and taking care that the conclusion was not one which was unwarranted by the evidence by granting a new trial if necessary. And now if upon the clear and admitted facts of the case it is clear what the proper legal conclusion is, they would be able to give effect to it at any period of the case.

It appears to me that the verdict was right, and that the articles are not paintings in the ordinary meaning of such a word used in connection with the words, "engravings, pictures." I think they are something different. They are rug patterns, and carpet patterns, and working designs. They would not, in my opinion, be described in any transaction relating to them collectively as paintings, but each would be described by its proper description, rug model, or carpet model, or working design. And according to the evidence the designs would have been registered, but of course under their appropriate name of designs not as paintings. In reality their value is not as paintings for the ordinary purposes for which paintings are valuable as works of art, but from their being attractive models and designs to get orders and to work by.

The case was argued upon the effect to be given to the word "paintings" in the Act: it was hardly suggested that if they did not come within that word they came within the word "pictures,"

They certainly appear to be within the mischief intended to be remedied by the Act, and if there were general words in addition, or if they could be brought reasonably under the description of paintings, the Act ought to apply; but they are something different, and the Act must not be strained to apply to something so different as working designs and patterns. The rule therefore must be discharged.

HAWKINS, J. I am of opinion that this rule ought to be discharged. I think my Brother Cleasby rightly treated the question, whether the lost articles fell within the description of "paintings" in the Carriers Act, as one of fact for the jury to determine. This was expressly decided in *Brunt* v. *Midland Ry. Co.* (1), and I think the jury properly came to the conclusion that they did not.

Looking at the articles themselves which were before us, it is difficult to suppose that anybody would call them "paintings." In the popular and ordinary sense of the word they were clearly not so. They were simply coloured designs or patterns for carpets, and nothing more. It is true they were painted, and painted with great care by hand, and as coloured or painted designs, were possessed of great merit and value; but there was nothing about them to give them the character of "paintings" in the ordinary acceptation of that word. Is the language of the Carriers Act then such as to shew that a wider and more extended interpretation should be given to that term? I think it is not. In the first place, I look to the collocation of the words of the statute, "paintings, engravings, pictures," which to my mind indicates the intention of the legislature that the word should receive its popular signification only. Then I look to the consequences of a wider interpretation, extending the meaning of the word to its literal significance. Looked at thus, it would include everything which was painted. So interpreted, it would include a plainly painted door or panel, &c., &c. It would be absurd to suppose that such was the meaning or intention of the legislature. It is a matter of common knowledge that many beautiful and artistic designs for hangings, paper for walls, muslins, china, &c., representing animals, flowers, landscapes, &c., are so exquisitely

(1) 2 H. & C. 889; 33 L. J. (Ex.) 187.

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drawn and painted that they may partake of the character of paintings in the popular sense, in addition to their character as designs in a commercial sense. Whether they do so or not must always be a question for a jury, subject of course to the control which the Court exercises over verdicts if they are manifestly wrong.

In the statute 5 & 6 Vict. c. 100, relating to the copyright of designs for ornamenting articles of manufacture, the correct description of the articles in question will, it seems to me, be found. Assuming the patterns in question to be new and original, they would clearly fall within the 3rd section of that Act as "designs" applicable for the pattern and ornamenting of carpets. Further light upon the subject may also be derived from the statute 25 & 26 Vict. c. 68, giving copyright in paintings, drawings, and photographs, the 1st section of which confers rights upon the author of "every original painting, drawing, and photograph." It would be exceedingly difficult to suppose that such articles as those in question are protected by this Act as original paintings, and that the author of them should have the power under it to secure to himself the copyright in them for the term of his life, and for seven years afterwards, as the author of an original painting might do, whereas the copyright in designs under 5 & 6 Vict. c. 100, is extended only to very limited periods. That the articles in question are of a similar character to those in respect of which the Carriers Act has afforded protection to carriers, there can be no question, but unfortunately the language of the Act is not such as to include them, and the defect in the Act, if it be one, can only be remedied by the legislature.

It may be asked, how is one to tell whether that which is painted is a painting or a mere painted design? where is the line to be drawn? I answer this question by adopting the language of Pollock, C.B., in *Brunt* v. *Midland Ry. Co.* (1), "The line is shifted according to the circumstances, but the question that we have to answer is not where to draw the line, but whether this is within the line? I think for all practical and reasonable purposes, wherever the line may be, and leaving the line in a state of doubt (which is a doubt that belongs to every line attempted to be

(1) 2 H. & C. 889; 33 L. J. (Ex.) 187.

drawn, either in nature or in the social exigencies of life), that this is without the line." I think therefore that the verdict for the plaintiff ought to stand, and the rule to be discharged.

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Rule discharged.

Solicitors for plaintiff: *Rooks, Kenrick, & Co.*
Solicitor for defendants: *R. F. Roberts.*

YOUNG *v.* KITCHIN.

March 4.

Practice — Assignment of Chose in Action — Set-off and Counter-claim for Damages against Assignee for Breach of Contract by Assignor—Judicature Act, 1873, *s.* 25, *sub-s.* 6—*Order XIX., Rule* 3.

The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counter-claim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor:—

Held, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor; and that the form of the defence must be amended accordingly.

DEMURRER to part of a set-off and counter-claim.

The statement of claim contained the following allegations:—Downs & Co. having contracted with the defendant to erect certain buildings for him at a schedule of prices completed them by the 1st of October, 1876, and the defendant then entered into possession of them. At that time there was due from the defendant to Downs & Co. in respect of the contract a balance of 6084*l.*, and all conditions had been performed, &c., necessary to entitle Downs & Co. to recover that sum from the defendant. By deed on the 5th of November, 1877, Downs & Co. assigned to the plaintiff all their interest in the debt of 6084*l.*, and on the 6th of November the plaintiff gave the defendant notice of the deed, but the defendant had never paid the debt.

The statement of defence, after denying most of the allegations in the statement of claim, and alleging that by reason of defects

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in the work and otherwise there was nothing due to Downs & Co., proceeded as follows by way of set-off and counter-claim against the plaintiff as assignee of Downs & Co.:—

The 6th paragraph alleged that on the 6th of January, 1876, an agreement was made between the defendant and Downs & Co., whereby, in consideration that the defendant would employ Downs & Co. to erect certain buildings at certain prices, they promised to complete and deliver the buildings to the defendant in August and September, 1876, respectively; that the works were to be paid for by the defendant on the architect's certificate as they proceeded, and that defects (if any) were to be remedied or allowed for by Downs & Co.

The 7th paragraph alleged that the defendant did all things necessary to entitle him to have the agreement performed, but Downs & Co. did not deliver the buildings to him till November, 1876, and August, 1877, respectively, whereby the defendant was unable to let the buildings for the reception of hops, for which purpose they were erected, as Downs & Co. knew when the agreement was made, whereby the defendant had lost much money.

The 8th paragraph alleged that there were defects in the buildings when delivered up which had not been remedied or allowed for by Downs & Co.

The defendant claimed 2100*l.* damages for not delivering the buildings to him at the respective times agreed on; and 800*l.* damages for the defects.

Demurrer to so much of the 7th paragraph as alleged breaches of contract by Downs & Co., on the ground that the plaintiff, as assignee of Downs & Co., could not be held liable for them, and that they constituted no answer to the action, and on other grounds sufficient in law.

Feb. 16. *Bush Cooper*, for the plaintiff. The part demurred to cannot be allowed, either as a set-off or as a counter-claim against the assignee, but is the subject only of a cross-action against the assignor. Otherwise a defendant might get judgment on the claim by shewing that the debt could not be recovered on one ground, e.g., that the debt was not effectually assigned, or that due notice was not given to the defendant, and might also

get judgment and recover damages on the counter-claim on another ground, e.g., that the assignor had not fulfilled his contract. The result would be that the plaintiff would not only lose his right to the debt, but have to pay damages for a liability incurred not by him but by the assignor. The defendant can only counter-claim under Order XIX., Rule 3, which enacts that "such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action." That is, it shall have no further effect than a claim in a cross-action against the plaintiff. But the defendant could not bring a cross-action against the plaintiff for a breach of contract to which the plaintiff was no party.

Bompas, Q.C. (*Clare* with him), for the defendant. Before the Judicature Acts a defendant, in an action to recover the sum agreed on for work done under a contract, might in reduction of damages give evidence that the plaintiff had not performed his part of the contract: *Allen* v. *Cameron.* (1) And now, by Order XIX. Rule 3, the defendant might set off against the assignor any cross-claim, whether sounding in damages or not. Whatever defence might be set up against the assignor may be set up against his assignee, for the assignee cannot be in a better position than his assignor. The plaintiff's right to sue is entirely created by the Judicature Act, 1873, s. 25, sub-s. 6, which enacts that the assignment of a debt or other legal chose in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." In equity the assignee could recover only the balance, after deducting the sum which the defendant was entitled to recover from the assignor. It will be a great hardship on the defendant if, when an insolvent creditor assigns his claim, the assignee can recover the whole debt from the debtor, while the latter is left to a fruitless remedy against a bankrupt assignor.

B. Cooper, in reply. The agreement to pay for the buildings is quite separate from the agreement to complete them, and the right to payment is independent of the time of delivery. The counter-claim ought at least to have been confined to a reduction of damages.

(1) 1 Cr. & M. 832.

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[The Court, CLEASBY, B. There are two objections taken to the defence—one of substance and the other of form. In substance I think the defendant is entitled to the benefit of this defence in reduction of the plaintiff's claim. The Judicature Act, 1873, s. 25, subs. 6 (1), says that the assignment of a debt or other legal chose in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed," that is, subject to all equities which would be enforced in a court of equity. I think this is a case where, in equity, the whole matter might be dealt with and the plaintiff's claim settled, after deducting all that ought to be deducted in respect of the failure to complete and deliver the buildings. (2) That is my opinion on the general merits; but on the question of form I will consider the pleadings.]

Cur. adv. vult.

March 4. CLEASBY, B. In this case the principal question was disposed of upon the argument by holding that the defendant was entitled, by way of set-off or deduction from the plaintiff's

(1) Subs. 6 enacts: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor . . . ."

Order XIX., Rule 3: "A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

(2) See *Tooth* v. *Hallett*, Law Rep. 4 Ch. 242, and the cases collected in 2 Tudor's Leading Cases in Equity, notes to *Ryall* v. *Rowles*, p. 800, 5th ed.

claim, to the damages which he had sustained by the non-performance of the contract on the part of the plaintiff's assignor.

Another question remained, upon the form of the defence and counter-claim; and it rather appeared to me that the counter-claim was in such a form (claiming, as I thought it purported to do, damages against the plaintiff) that the 7th paragraph shewed no title to such a claim, and was therefore demurrable.

The form has been followed of a counter-claim in an ordinary case, where the plaintiff does not sue as the assignee of a chose in action, and where the defendant is entitled to judgment for the balance of his counter-claim if it overtops that of the plaintiff. But this is not the case here; the defendant has no claim to recover anything against the plaintiff; he only meets the plaintiff's claim by a counter-claim of damages arising out of the same contract, and this ought to appear upon his defence and counter-claim.

The above objection would apply equally to the allegation of the 8th paragraph, which is not demurred to. And this rather shews that the plaintiff did not intend by his demurrer to rely upon this formal objection, but to raise the substantial question which has been decided, and the defendant has been misled, or he might have amended the formal defect.

The proper course is, I think, to overrule the demurrer, the costs to be costs in the cause, the defendant to be at liberty to amend his claim by shewing that he does not claim to recover damages against the plaintiff, but only to set them off against the plaintiff's claim.

Judgment accordingly.

Solicitor for plaintiff: *A. H. Miller.*

Solicitor for defendant: *Pettengill.*

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Feb. 5.

BAKER, Appellant; CARTER, Respondent.

Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 51—*Liability of Owner for Contravention of General Rule by another Person.*

The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, after providing general rules to be observed in every mine to which the Act applies, enacts that in the event of any contravention of, or non-compliance with, any of the general rules by any person whomsoever being proved, the owner, agent, and manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.

An information was preferred under this section against the part owner of a coal mine, in which one of the general rules regulating the employment of machines had not been complied with. The evidence was that the general rules were put up in various parts of the mine, and that the defendant occasionally visited the mine, but resided at a distance, and took no part in the management, which was under the exclusive control of the certificated manager, who was also part owner. The defendant was not examined as a witness, as he might have been under s. 63, sub-s. 4, but it was admitted that he had not personally taken any means to enforce the rules. The justices found as a fact that the defendant had taken all reasonable means by publishing, and to the best of his power enforcing, the rules as regulations for the working of the mine to prevent such non-compliance, and dismissed the information:—

Held, that there was evidence from which the justices might properly come to that conclusion.

Case stated under 20 & 21 Vict. c. 43.

At a petty sessions holden at Wednesbury on the 16th of October, 1877, in the county of Stafford, an information was preferred under s. 51 of 35 & 36 Vict. c. 76, by the appellant, Her Majesty's inspector of mines, against the respondent, for neglecting to observe the 22nd general rule of that section, which provides: "There shall be on the drum of every machine used for lowering or raising persons such flanges or horns, and also, if the drum is conical, such other appliances as may be sufficient to prevent the rope from slipping."

Upon the hearing of the information it was admitted by the parties, and found by the justices as a fact, that the respondent was joint owner, with one Beddow, of the Golds Green Colliery, situate at West Bromwich; that Beddow was then the certificated manager of the colliery, and had the exclusive management of it, but had since died; that the drum of the machine used for lowering

and raising persons at a pit in the colliery then being cleansed and repaired was not provided with such flanges or horns as were sufficient to prevent the rope from slipping, as required by the 22nd general rule; that the rope slipped off the drum, and coiled upon the square drum shaft, the sharp angles of which nearly severed the rope, and when the engine man attempted to uncoil the rope it parted at the drum shaft, and the iron water barrel attached to the rope with the rope fell down the pit and killed two men engaged at the bottom of the pit shaft.

It was thereupon contended, on the part of the appellant, that Beddow, as the certificated manager, had not complied with the 22nd general rule, and was consequently, according to the last paragraph of s. 51 of 35 & 36 Vict. c. 76, guilty of an offence against that Act, and inasmuch as the same section proceeded to enact—"That in the event of any contravention of, or non-compliance with, any of the said general rules in the case of any mine to which this Act applies by any person whomsoever being proved, the owner, agent, and manager shall each be guilty of an offence against this Act,"—that the respondent being an owner of the mine was also guilty of an offence against the Act.

For the defence the respondent quoted the concluding part of the same section of the Act—"unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance," and contended that the respondent had taken all reasonable means, by the appointment of a certificated manager, who was part owner and sole manager of the colliery, and by publishing, and to the best of his power enforcing, the said rules as regulations of the working of the mine, to prevent such non-compliance. The respondent called as a witness the clerk at the colliery, who said as follows: "On the 12th of March Beddow was the certificated manager, and had the entire management. The respondent, a gentleman in Birmingham, was a partner in the colliery. He took no part in the management. The general rules under the Act of Parliament are published at the colliery. They are stuck up in the office, the engine-house, and the pit-hovel. They are there now. On the 12th of March, and preceding it, Beddow was

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regularly at the colliery. His illness prevented him from attending sometimes. He was the only person who took any part in the management. He was there on the very day of the accident. I have seen the respondent there."

It was alleged for the defence that the respondent had not in any way taken part or interfered in the management of the mine or colliery, and admitted that he had not personally taken any means to enforce the rules as regulations for the working of the mine.

The justices found as a fact that the respondent had taken all reasonable means by publishing and, to the best of his power, enforcing the rules, as regulations for the working of the mine, to prevent such non-compliance with any of the general rules, and gave their determination against the appellant in the manner above stated.

The question of law for the opinion of the Court is, whether the mere fact of the rules having been published at the colliery, and in the absence of evidence that the respondent had personally done any act towards enforcing such rules, but had left the entire management to his partner and certificated manager, was sufficient in point of law to warrant the justices in coming to the above determination.

Gorst, Q.C. (*Reginald Brown* and *Muir Mackenzie* with him), for the appellant. There was no evidence upon which the justices could find that the respondent had used all reasonable means to prevent a contravention of the rules, the only evidence being that the rules were published by some one, and that the mine was managed by a certificated manager. The respondent is concluded by the admission that he had done nothing whatever towards enforcing the rules. It was not even proved that it was the respondent who had published them. By s. 63, sub-s. 4, "The owner, agent, or manager may, if he think fit, be sworn and examined as an ordinary witness in the case, where he is charged in respect of any contravention or non-compliance by another person." The respondent ought at least to have been called as a witness. He might have proved he had weekly reports from the manager, or taken some other means to enforce the rules. It is quite consistent with the case that he may have actually approved the machine in question, and seen it in work.

R. E. Webster, for the respondent, referred to a similar general rule in 23 & 24 Vict. c. 151, s. 10, r. 11.

Gorst, Q.C., replied.

CLEASBY, B. I think there was enough to justify the magistrates in coming to the conclusion that the respondent had taken all reasonable means by publishing, and to the best of his power enforcing, the rules as regulations for the working of the mine, to prevent such non-compliance with any of the general rules. This is an important matter, involving serious considerations to the owners of mines, but of course that must not lead us to come to any conclusion not warranted by the words of the statute.

The state of things was this. The mine was owned by the respondent and Beddow as partners. Beddow was the certificated manager. Now the Act requires, by s. 26, that the mine "shall be under the control and daily supervision of a manager," and "a person shall not be qualified to be a manager of a mine to which this Act applies unless he is for the time being registered as the holder of a certificate under this Act." That is, no doubt, consistent with any other person who is an owner taking part in the management; but the owner is bound by s. 26 to appoint some competent person to be the manager, and if the mine is worked for more than fourteen days without there being a certificated manager, the owner is liable to a penalty, "unless he prove that he had taken all reasonable means by the enforcement of this section to prevent the mine being worked in contravention of this section."

There is also this additional fact, that the certificated manager, under whose control and daily supervision this mine was, had the exclusive management of it. Is not a man who has a share in a mine justified in leaving the management to a person who has the daily supervision of the mine, and who, the Act says, *shall* have the control of it? There is no statement in the case as to how the defect arose, whether by the default of Beddow or not. It is, perhaps, accounted for by his illness, though it appears that he was there on the day in question.

I think we ought not to interfere with the conclusion of the magistrates, and I base my decision on this, that a proper person, a certificated manager under the Act, had been appointed to see that everything was done that ought to be done. A point occurred

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to me which Mr. Webster urged in his argument. Suppose an owner contravened Rule 29, which requires that "a competent person or competent persons who shall be appointed for the purpose shall once at least in every twenty-four hours examine the state of the external parts of the machinery, and the state of the head-gear, working places, levels, planes, ropes, chains, and other works of the mine which are in actual use," &c. How is it possible for an owner living at a distance to see that that rule is never contravened? If it is contravened, surely the owner will be able to discharge himself if he proves that a competent person, certificated under the Act, has been appointed manager.

It would be straining the law if—where a part owner, perhaps living at a great distance, has taken care to have the rules published, and appointed a competent person, a certificated manager under the Act, to have the control and daily supervision of the mine,—we were to hold that the magistrates before whom the case comes are not at liberty to find that the part owner had taken all reasonable means to prevent a contravention of the rules. The magistrates have found that as a fact in the present case, and I should be very sorry to call their finding in question.

POLLOCK, B. I have come to the same conclusion, though at first I entertained considerable doubt on the question as left to us by the magistrates. But the facts go beyond the question as so left to us, and our decision rests on the facts, and not on the form of the question. The defendant, though he was occasionally at the mine, lived at Birmingham and took no part in the management, which was under the exclusive control of the defendant's part owner, who was a certificated manager. I ask myself, after reading the last clause in s. 51, what are the reasonable means which a non-resident owner would take to enforce the rules? He would appoint a certificated manager to reside at the mine and take all the management. That is what was done here, and on this ground I think the finding of the justices was warranted by the evidence.

Appeal dismissed with costs.

Solicitors for appellant: *Sharp & Ullithorne.*

Solicitors for respondent: *Doyle & Sons, for Henry Jackson, West Bromwich.*

GIRDLESTONE *v.* THE BRIGHTON AQUARIUM COMPANY. 1878 *March* 4.

Sunday Profanation—21 *Geo.* 3, *c.* 49, *ss.* 1, 4—*Action for Penalties*—*Judgment obtained by Covin and Collusion no Bar*—*Covin and Collusion, what is Evidence of.*

The defendants having, on Sunday, the 15th of August, 1875, kept open the Brighton Aquarium as a place of public entertainment, and thereby incurred a penalty under 21 Geo. 3, c. 49, the plaintiff, on the 17th, brought an action to recover the penalty, but omitted to specify in the writ the Sunday in respect of which he was suing. On the 20th of October, R. brought an action against the defendants claiming penalties in respect of the 15th of August and all the Sundays intervening between that date and the issue of R.'s writ; and on the 28th of October judgment was signed in R.'s action by default. This judgment the defendants pleaded in bar of the plaintiff's action, and the plaintiff replied that the judgment was obtained by covin and collusion. At the trial of the plaintiff's action, in 1877, it was proved that R.'s action was brought at the request of the defendants, their object being to protect themselves from all actions in respect of the penalties included in R.'s action, and also to obtain, as soon as possible, from the Secretary of State a remission of the penalties under 38 & 39 Vict. c. 80. When R.'s action was brought he did not know of the existence of the plaintiff's action, but he agreed verbally that the defendants might make what use they pleased of his action, and that he would not issue execution or claim penalties. The judge directed the jury that the above circumstances disclosed ample evidence of covin and collusion, and the jury found a verdict for the plaintiff:—

Held, first, that the judgment in R.'s action was obtained by covin and collusion, and could not affect the rights of third parties; and that the verdict ought not to be disturbed:

Secondly, that independently of covin and collusion, the penalty sued for in the plaintiff's action became a debt to him as soon as the writ was issued, and his right to recover could not be affected by any subsequent action; and that since the plaintiff was in fact suing in respect of the 15th of August, and the defendants knew it, the fact of the date not having been specified in the writ was immaterial.

THE statement of claim (delivered on the 24th of November, 1875) alleged that the defendants, on Sunday, the 15th of August, kept open the Brighton Aquarium as a place of entertainment and amusement for the public, who were admitted by the payment of money, contrary to 21 Geo. 3, c. 49, and claimed the penalty of 200*l.* given by s. 1.

The statement of defence alleged that the defendants were

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heretofore sued in the Court of Common Pleas, in an action at the suit of Rolfe, for the same cause of action and in respect of the same Sunday named in the statement of claim, and for the same penalty, and that judgment was signed against the defendants in Rolfe's action on the 28th of October, 1875, and still remained in force.

The plaintiff's reply took issue on the statement of defence, and denied that in Rolfe's action judgment was recovered for the same cause of action in respect of the same Sunday in respect of which the present plaintiff was suing; and further alleged that Rolfe's action was prosecuted and judgment recovered by covin and collusion between the defendants and Rolfe. Issue thereon.

At the trial before Cleasby, B., in Middlesex, in April, 1877, it appeared that the writ in this action was issued on the 17th of August to recover a penalty of 200*l.* under 21 Geo. 3, c. 49, incurred by the defendants for having opened the aquarium as a place of public entertainment or amusement on Sunday, the 15th of August. The writ did not shew in respect of what day the penalty was claimed. The defendants opened the aquarium on the 15th of August, and on each succeeding Sunday up to and including the 17th of October. In that month their solicitor communicated with one Rolfe, and obtained his leave to bring an action in his name against the defendants for penalties, Rolfe verbally agreeing that the defendants should be at liberty to make any use they pleased of the action, and that he would not issue execution or claim any penalties. Rolfe did not then know of the present action having been brought. The defendants' solicitor, by arrangement with Rolfe's solicitor, issued a writ in Rolfe's name against the defendants on the 20th of October, claiming penalties for each Sunday from the 15th of August to the 17th of October, both inclusive, and judgment was signed by default on the 28th of October. The defendants' solicitor admitted that the object of the defendants in taking this course was that Rolfe's action might protect them against all other actions in respect of each of those Sundays, and to ascertain in what manner the Home Secretary intended to use the power to remit penalties given him by 38 & 39 Vict. c. 80.

The plaintiff contended that this evidence proved covin and collusion, and that, independently of that question, the statute 21 Geo. 3, c. 49, ss. 1, 4 (1), made the penalty a debt from the defendants to the plaintiff as soon as the writ was issued, and that no subsequent action could affect the right to recover that debt. The defendants contended that as the latter point did not appear upon the pleadings it could not now be raised. Cleasby, B., told the jury that on the above facts there was ample evidence of covin and collusion, and left that issue to them, and they found a verdict for the plaintiff.

A rule nisi having been obtained to set aside the verdict and the judgment (if any) and enter a verdict for the defendants on the ground that on the facts proved there was no evidence of covin and collusion; or for a new trial on the ground that the learned judge misdirected the jury in not telling them that there was no evidence of covin and collusion; and in telling them that the judgment in Rolfe's action was a form and of no effect, and that judgment in any action not brought for the purpose of enforcing judgment was collusive and covinous; and in not telling them that in order to be collusive and covinous the judgment in Rolfe's action must have been fraudulently or deceitfully procured, and that to constitute covin and collusion there must be secret agreement or assent between two or more persons, with a view to the defrauding or prejudicing of another; and on the ground that the verdict was against the weight of evidence:—

Feb. 6, 7. *Bosanquet* (*Wilberforce* with him), for the plaintiff, shewed cause, and contended first, that there was ample evidence

(1) Sect. 1 enacts that "any house, room or other place which shall be opened or used for publick entertainment or amusement, or for publickly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room or place shall forfeit the sum of 200*l.* for every day that such house, room or place shall be opened or used as aforesaid on the Lord's Day, to such person as will sue for the same. . . ."

Sect. 4 enacts that "any person entitled to either of the aforesaid forfeitures may sue for the same by action of debt in any of his Majesty's Courts of Record at Westminster. . . ."

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of covin and collusion; secondly, that even if there was no such evidence Rolfe's judgment was no answer to Girdlestone's action, inasmuch as the writ in the latter was issued first: *Combe* v. *Pitt* (1); *Jackson* v. *Gisling* (2).

C. Russell, Q.C., and *Macdonell* (*McMillan* with them), for the defendants, in support of the rule. First, Rolfe's action was not collusive or covinous, but was brought with the twofold object of protecting the defendants and ascertaining the opinion of the Home Secretary as to the use to be made of the Remission of Penalties Act, 1875 (38 & 39 Vict. c. 80). The learned judge omitted to direct the jury that fraud must be found in order to establish collusion: *Fermor's Case* (3); and 6 Vin. Abr. p. 474, tit. Covin. Co. Litt. 357 (b), defines covin as "a secret assent determined in the hearts of two or more to the defrauding and prejudice of another." To establish covin and collusion there must be evidence of fraud on the part of Rolfe as well as of the defendants: *Meriel Tresham's Case* (4). Fraud on the defendants' part alone would not suffice: *Meddowcroft* v. *Huguenin* (5), and *Perry* v. *Meddowcroft* (6). There could be no fraud, covin, or collusion, since Rolfe, when he made the agreement in question, did not know of Girdlestone's action. The fact that the defendants incited Rolfe to bring an action would not of itself constitute collusion: *Gethin* v. *Gethin* (7); *Blundivell* v. *Loverdell* (8). The object of the defendants being to bring a case before the Home Secretary to be decided on its merits, the agreement cannot be called collusive: *Donegal* v. *Donegal* (9); *Shaw* v. *Gould* (10). As to the second point the rule laid down in *Combe* v. *Pitt* (1) is no longer in force; it was by implication repealed by the Uniformity of Process Act (2 Wm. 4, c. 39). Even if the rule still subsists, the plaintiff has not put himself within it, since his writ does not specify the Sunday in respect of which he sues, and the statement of claim might have specified any other Sunday. A right of

(1) 3 Burr. 1423.
(2) 2 Str. 1169.
(3) 3 Rep. 204.
(4) 9 Rep. 108 (a).
(5) 4 Moo. P. C. 386.
(6) 10 Beav. 122.
(7) 31 L. J. (P. & M.) 43.
(8) Sid. 21.
(9) 3 Phill. Ecc. Ca. at p. 601.
(10) Law Rep. 3 H. L. 56.

action in respect of the 15th of August could not be said to vest in the plaintiff by the issue of a writ which did not specify that date. Moreover the plaintiff ought to have raised this point on the pleadings, and not having done so he cannot avail himself of it now.

Cur. adv. vult.

March 4. The judgment of the Court (Kelly, C.B., Cleasby and Pollock, BB.) was delivered by

CLEASBY, B. The facts of this case are not in dispute. It is admitted that the plaintiff brought his action on the 17th of August to recover a penalty under the statute 21 Geo. 3, c. 49. This made the penalty, if recoverable, a debt from the company to the plaintiff. It is further admitted that afterwards, on the 20th of October, the defendants got permission from a man named Rolfe to bring an action for penalties in his name. It was not disputed that this action was a protective action, that is to protect the defendants from the various penalties which were accruing by being used as an answer to actions which might be brought for the various penalties included in it. It was brought in respect of penalties accruing on the 15th of August (the penalty sought to be recovered by the statement of claim in this action) and the several Sundays between that day and the 17th of October. Judgment was recovered in that action by default on the 28th of October. Proof was given that the proceedings in the name of Rolfe were taken with another view as well, viz., to obtain as soon as possible a remission of the penalties by the Secretary of State, under 38 & 39 Vict. c. 80. But this collusive proceeding for an innocent purpose did not make it a real recovery of the penalty by the defendants against themselves, or prevent it from being collusive for an injurious purpose, viz., to deprive others of the right to recover the penalties which had accrued.

It appears to us, therefore, that such a fictitious judgment is no judgment at all to affect the rights of third parties. The question arose at the trial, upon the reply that the judgment was obtained by covin and collusion. Now, it can hardly be questioned that it

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was by collusion that the judgment was obtained against the defendants by the defendants in the name of Rolfe, for whatever purpose it was obtained, and as to its being covinous, the definition of covin was given in the argument from Coke upon Littleton, and we have it very clearly given in the Termes de la Ley (ed. 1708)—"Covin is a secret assent determined in the minds of two or more to the prejudice of another." In the present case the secret assent was the assent of Rolfe to the defendants borrowing his name to bring the action against themselves, and the prejudice of another was the judgment being used, as in the present case, to defeat the rights of others. It matters not whether Rolfe was kept in ignorance of the purpose to which the action was to be applied or not, it was not the less covinous in the defendants.

One instance is put in the same book (Termes de la Ley) under the title "covin," of the use of a judgment fraudulently obtained. "Or if an executor or administrator permit judgments to be entered against him by fraud and plead them to a bond . . . . the party grieved may plead covin and relieve himself." In like manner, it appears to us, that the plaintiff may relieve himself by pleading covin as an answer to the judgment obtained by the defendants.

We were referred to certain passages in the summing up of the learned judge to the effect that if the judgment was obtained collusively, and not intended to operate as a judgment, that would be sufficient. If those passages be taken by themselves they might mislead the jury, but taken in connection with the circumstances of the case and the rest of the summing up they would not do so. The plea itself shewed the injurious purposes to which the judgment was applied, and as soon as it was admitted that it was intended to be protective, that part of the case did not require to be particularly referred to. And, further, even if there was an imperfect direction in this particular, yet, as it is clear that no substantial wrong or miscarriage has been occasioned thereby, we ought not to grant a new trial: see Order XXXIX., Rule 3, Judicature Act, 1875.

Another objection to the defence was presented at the trial and has been argued before us. It did not appear to arise upon the

pleadings, and was therefore put aside at the trial; but if a new trial were granted, and the statement of defence amended, there would be an answer to the plea. The present action was brought on the 17th of August, and the penalty sought to be recovered was in respect of the opening of the Aquarium on the 15th of August. The effect of bringing the action was to make the penalty a debt due to the plaintiff, and no other action could afterwards be maintained in respect of it: *Jackson* v. *Gilling* (1); *Hutchinson* v. *Thomas* (2); see also *Combe* v. *Pitt* (3); though in that case the plea was in abatement. It follows that upon its appearing that the present action was commenced before Rolfe's action, the proceedings in Rolfe's though prosecuted to judgment could have no effect upon the right of the plaintiff. The only answer that could be given to this objection was, that it did not appear upon the face of the writ that it was sued out in respect of the forfeiture of the 15th of August, and that any other Sunday upon which there had been a performance might have been inserted in the statement of claim. But as there is no doubt that the action of the 17th was in respect of the previous Sunday, the 15th, and as the defendants knew that the action was in respect of that Sunday, it appears to us to make no difference that the writ does not specify the date: see the judgment of Parke, B., in *Reg* v. *Bird*. (4)

The case of *Chalchman* v. *Wright* (5) is an authority upon the whole case. It shews that previous proceedings are a bar to subsequent proceedings for the same penalty, and that proceedings to be a bar must be bonâ fide. It was there decided that a previous information for the same penalty is a good bar if it be bonâ fide, but if it be not bonâ fide the plaintiff may plead the fraud. Otherwise the defendants could keep the Aquarium open and incur a penalty every Sunday, and get a friend on every Monday morning to bring an action, and make these fictitious actions a defence to real ones, and so defeat the Act of Parliament.

The jury in the present case found that the judgment was

(1) 2 Str. 1169.
(2) 2 Lev. 141.
(3) 1 W. Bl. 437; S. C. 3 Burr. 1423.
(4) 20 L. J. (M.C.) at p. 94.
(5) Noy's R. 118.

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covinous and collusive, and for the above reasons we think we ought not to grant a new trial, and therefore the rule must be discharged.

Rule discharged.

Solicitors for plaintiff: *Bridges, Sawtell, Heywood, & Co.*
Solicitors for defendant: *Benham & Tindell.*

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Dec. 20.

[IN THE COURT OF APPEAL.]

MULLIN *v.* MONICO.

Practice—Performance under Judicature Act, 1873, *ss.* 56, 57—*Official Referee—Reference for Report—Reference for Trial.*

The Court or a judge has no power under ss. 56, 57, to order an action to be referred to an official referee, for s. 56 only allows any question arising in a cause to be referred for inquiry and report, and the report may or may not be adopted by the Court; and s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee if the parties consent in any cause, and if they do not consent in any cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation.

An official referee has no power to order judgment to be entered on any question referred to him under ss. 56, 57 of the Judicature Act, 1873.

THIS case is reported 3 C. P. D. 142.

[IN THE COURT OF APPEAL.]

1878
Jan. 30.

TURNER *v.* THE HEDNESFORD GAS COMPANY.

Practice—Counter-claim—Rules of the Supreme Court, Order XXII., Rule 5—*Words "Question between Defendant and Plaintiff along with any other Person or Persons"—Order XVI., Rule* 3—*Judicature Act*, 1873, *s.* 24, *sub-s.* 3.

A defendant is entitled to add a third person as party to the action if the defendant's counter-claim shews a question arising between himself and the plaintiff along with that third person, and relating to the cause of action sued upon by the plaintiff, even although the third person could not be a party to the plaintiff's original claim.

Claim for damages for preventing the plaintiff from completing certain work pursuant to a contract with the defendants. Defence: that by a clause in the contract the defendants had power to take the work out of the plaintiff's hands if he failed to do it properly; that the plaintiff did so fail, and the defendants took the work out of his hands; and, by way of counter-claim, that owing to the plaintiff's breach of contract the defendants did expend 256*l.* in excess of what it would have cost them if the plaintiff had fulfilled his agreement; and that one R. had, by a general bond, bound himself in the sum of 200*l.* for the proper execution of the work, and they sought to recover 256*l.* from the plaintiff, and 200*l.* under the bond, from R. The defendants having served R. with the defence and counter-claim pursuant to Order XXII., Rule 6, R. moved to strike out the counter-claim:—

Held, reversing the decision of the Exchequer Division, that the claim for relief by the defendants against R., by way of counter-claim, was a question arising between the defendants and the plaintiff along with R. within the meaning of Order XXII., Rule 5; and the defendants were entitled to add R. as party to the action.

CLAIM for preventing the plaintiff from completing certain work pursuant to a contract with the defendants.

Defence: that the agreement contained a clause that provided, if the plaintiff failed to carry out the work with the requisite expedition, or according to the instructions of the defendants' engineer, the defendants might take the work wholly or in part out of the plaintiff's hands; that the plaintiff did so fail, and that the defendants took the work out of the plaintiff's hands and completed it themselves. And by way of counter-claim the defendants set up that the defendants, owing to the plaintiff's breach of

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contract, had been obliged to spend 850*l.* in completing the work, being 256*l.* in excess of what it would have cost them if the plaintiff had fulfilled his agreement; the counter-claim also set out a bond executed by Round, in which he had bound himself to be answerable to the defendants to the extent of 200*l.* for the proper execution of the contract by the plaintiff to the entire satisfaction of the defendants' engineer.

The defendants, by the counter-claim, sought to recover 256*l.* from the plaintiff, and 200*l.* under the bond from Round.

The defendants served Round with the defence and counter-claim pursuant to Order XXII., Rule 6; and the master, on a summons at the instance of Round, having made an order that the counter-claim be struck out, the order was reversed by Pollock, B., at chambers. Round appealed to the Exchequer Division.

Jan. 15. *Moulton*, for Round.
Anderson, for the defendants.

CLEASBY, B. This case has been fully argued, and we have arrived at the conclusion that this counter-claim ought not to stand in its present form. The ground on which we act is that a counter-claim must ask relief against the plaintiff, either separately or jointly with some other person. That has been decided, and the very nature of a counter-claim seems to require it. A defendant is enabled to join another party in a counter-claim provided the relief is sought against the plaintiff also.

What is the counter-claim here? Can it be said to claim relief against the plaintiff and Round together? Does it seek relief against Round in respect of the same matter as against the plaintiff? We think not. The statement of defence and counter-claim are to this effect: as an answer to the action the defendants set up a clause in the agreement which entitled them, upon the failure of the plaintiff to do certain things, to take the work out of his hands and do it themselves. Then the counter-claim against the plaintiff is, that owing to the plaintiff's default the defendants were obliged to spend 850*l.*, being 256*l.* in excess of what it would

have cost them if the plaintiff had fulfilled his contract. How can it be said that that is a claim against Round, who is the obligor of a bond given as security for the proper execution by the plaintiff of the contract? It does not appear that the bond was in the same terms as the agreement between the plaintiff and defendants. I do not, indeed, dwell on that as important, but this consideration occurs to me. If all that the defendants had alleged had been matter which shewed they had a defence against the action arising out of the contract, could they have had a counter-claim against Round? No one would say they could. Clearly the counter-claim must have been against the plaintiff, or against him jointly with some one else. We are dealing here with a counter-claim under an order of the Judicature Act, and we must see that it comes within the order. We are not dealing with a case where a defendant gives notice to another party, but where he is seeking to add a party to his counter-claim. Well, then, does the circumstance that the defendants have also a counter-claim against the plaintiff, in respect of the 256*l.* excess which his default has cost them, justify them in bringing in Round as a party simply because he gave a bond, when the only ground of their counter-claim against the plaintiff is the recovery of the 256*l.*, with which Round has nothing to do? I think not. The two counter-claims are quite separate and distinct.

The counter-claim against the plaintiff must therefore stand, and that against Round be struck out.

HAWKINS, J. I am entirely of the same opinion. If there had been no counter-claim against the plaintiff, it would have been impossible to make Round a party, and set up a counter-claim against him singly. Now it is sought to bring Round in on a matter with which the plaintiff has nothing to do.

Order of Pollock, B., rescinded with costs.

Jan. 30. The defendants appealed.

Matthews, Q.C., and *Anderson*, for the defendants. The decision

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of the Exchequer Division cannot be supported. The case comes within Order XXII., Rule 5 (1), and Round was properly made a party to the suit. The counter-claim raises questions between the defendants and the plaintiff along with Round, and those questions are of such a nature that the defendants might have brought an independent action against the present plaintiff and Round, for under Order XVI., Rule 3 (2), all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. In *Child* v. *Stenning* (3) it was pointed out that, in order to enable a plaintiff to join two persons as defendants, the causes of action between them need not be identical. As the plaintiff and Round might have been sued in one action, the present defendants are entitled to enforce their right against Round by way of counter-claim in the present suit. The claim to compel payment of the amount secured by the bond is relief "relating to or connected with the original subject-matter of the cause": s. 24, sub-s. 3 of the Judicature Act, 1873 (4); because the plaintiff's claim is that he has been prevented from carrying out a contract, and the defendants

(1) Order XXII., Rule 5: "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff, along with any other person or persons, he shall add to the title of his defence a further title, similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced in a cross-action, would be defendants to such cross-action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff."

(2) Order XVI., Rule 3: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities, without any amendment."

(3) 5 Ch. D. 695.

(4) By s. 24, sub.-s. 3 of the Judicature Act, 1873, the Courts respectively and every judge thereof shall have power to grant to any defendant . . . all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose.

allege that he has committed a breach of the same contract, for which breach, Round, as the plaintiff's surety, is bound to compensate the defendants, and unless the alleged breach is proved, the liability of Round does not arise. In *Dear* v. *Sworder* (1) the plaintiffs, second mortgagees, claimed to be paid out of the proceeds of a sale to be completed pursuant to a contract entered into by the defendant, the first mortgagee; the purchaser having refused to complete, it was held that the defendant was entitled to make the purchaser a party to the action. As the question in the present case between all the parties is one litigation, it is right that it should be tried in one action.

McIntyre, Q.C., and *Moulton*, for Round. This is not a counter-claim, but it is a separate suit arising out of a distinct transaction. The defendants do not claim a joint, separate, or alternative relief; they claim a distinct remedy against the plaintiff and Round, viz., damages to be paid by the plaintiff, and indemnity from Round on a bond to which the plaintiff is not a party. Order XXII., Rules 5 and 6, do not authorize this. In order to enable a defendant to add a third party, there must be a question between himself and the plaintiff along with some other person. If the defendants brought an action against Round, the plaintiff could not be joined as a party. A counter-claim which does not claim relief against the plaintiff also is bad: *Furness* v. *Booth* (2); and here the counter-claim upon the bond does not, and cannot, set up any title to relief as against the plaintiff. From the observations of Mellish, L.J., in *Treleaven* v. *Bray* (3), it is clear that the defendants cannot delay the plaintiff by claiming relief against some other person by whom they allege they ought to be indemnified.

Matthews, Q.C., in reply.

BRAMWELL, L.J. I think that the appeal ought to be allowed. Where a defendant has a good counter-claim, and if he had brought a separate action he could have recovered, I think it reasonable that he should be as well off as if he had been a plaintiff in a cross action. The words of Order XXII., Rule 5, are "where the

(1) 4 Ch. D. 476. (2) 4 Ch. D. 586.
(3) 45 L. J. (Ch.) at p. 114.

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defendant sets up a counter-claim between himself and the plaintiff along with any other person, he shall add to the title of his defence a further title setting forth the names of all persons who, if such counter-claim were to be enforced by cross-action, would be defendants in such cross-action." I at first felt a little difficulty as to the meaning of the words "would be," for primâ facie they seem to indicate that the defendant could only make another person party to the counter-claim who might have been a defendant in an action brought by the defendant against him and the present plaintiff upon a joint contract, but I think the true meaning is that if the defendant could have made the plaintiff and the third party defendants in any action, the counter-claim is valid. Could the defendants have brought an action against Round and the plaintiff? I am of opinion they could. The relief that the defendants claim against Round is indemnity for the breach by the plaintiff of his contract, to the extent of 200*l.*, but the relief that is sought is on a contract between the defendants and Round, it is not a joint, but a several, liability. If the obligation, however, had been created between the parties in one instrument, limiting Round's liability to 200*l.*, in that case it would have been a joint contract, and I think that the substance of the actual contract between the parties is the same. Unless we hold that the amount sought to be recovered is an independent liability arising on a different contract, the present defendants would be entitled to join Round as a defendant in an action. As they can do that, I think that Round can be joined with the plaintiff in the counter-claim.

BRETT, L.J. I am of the same opinion and found my decision on Order XXII, Rule 5. The words are that "where the defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff, along with any other person or persons," but the rule does not provide that the "questions" shall arise out of the cause of action mentioned in the statement of claim. The meaning of the order and rule is if the questions raised in the counter-claim would have formed a good cause of action in a cross action, brought by the actual defendant against

the actual plaintiff and some other person, that third person may be made a party to the existing suit by counter-claim. The principle is, that wherever, by reason of some legal or equitable relation between the parties, the question in the case between the defendant and the plaintiff, which is, if true, a good counter-claim against the plaintiff, may also be a question between the defendant and a third person; although such third person could not be a party to the plaintiff's original claim, he may be joined to the existing suit by counter-claim. By the defendants' counter-claim a question is raised between the defendants and the plaintiff which, if true, gives a good counter-claim to the defendants against the plaintiff; but that question gives rise to a further question which, by reason of the relation of the plaintiff and the defendants and Round, might be raised in an action by the defendants against the plaintiff and Round. It is true that the defendants' claim against Round is founded upon a deed between them to which the plaintiff was not a party; but there is an equitable relation between all the parties, because Round by that deed became a surety for the performance by the plaintiff of the contract with the defendants, and the same question of liability arises to the defendants as arises against the plaintiff and Round. But Round cannot be made liable to the defendants unless the plaintiff has been guilty of some breach of the contract. The relation, I think, is intimate enough to admit of Round being made a party to this suit. I venture to think that where the litigation obviously involves questions between the plaintiff and the defendant and other parties, we ought to give a liberal interpretation to these orders and rules, which were, no doubt, framed with the intention of settling in one litigation all questions arising out of the subject-matter of the dispute.

COTTON, L.J. I think the defendants are entitled to set up the counter-claim and that the appeal should be allowed. Does this counterclaim raise a question between the plaintiff and the defendants and Round? The objection is that the bond is a separate bond by Round and not a joint bond by the plaintiff and Round, but that objection cannot be allowed to prevail; it is one litigation

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respecting the same matter. The counter-claim need not be co-extensive with the claim, and I think the case is within Order XXII, Rule 5, and it is very advisable to settle all questions in one action. In *Furness* v. *Booth* (1) the question was whether or no there was any counter-claim, and it was decided there was no counter-claim; here the question is whether there is a good counter-claim. I think clearly that there is.

Appeal allowed.

Solicitors for Round: *Duignan & Smiles.*

Solicitors for defendants: *Norris, Allen, & Carter, for J. P. Gardner, Cannock.*

(1) 4 Ch. D. 586.

PATSCHEIDER *v.* THE GREAT WESTERN RAILWAY COMPANY. 1878 Jan. 21.

Carrier—Railway Company—Passenger's Luggage—Delivery to Passenger—Termination of Company's Risk.

It is the duty of a railway company with regard to the luggage of a passenger, which travels by the same train with him but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; and the liability of the company does not cease until a reasonable time has been allowed to the owner to do so.

THIS was an action to recover the value of a box and its contents, lost through the alleged negligence of the defendants. At the trial before Denman, J., at the Easter Sittings in Middlesex for 1877, it appeared that the plaintiff, a lady's maid, was travelling with her mistress on the defendants' line from Malvern to Paddington. On arrival at the latter station the plaintiff saw her box taken from the luggage-van and placed on the platform with other luggage of her mistress. She then went for the porter of the hotel to take the luggage to the hotel, but when she subsequently arrived there she could not find the box among the luggage which the hotel porter had brought. The evidence, as to what had happened with respect to the box after it was taken from the van and placed on the platform, was conflicting; but the jury found that there had been no delivery to the plaintiff. They also found that the box had been lost by the negligence of the defendants, and that there had been no contributory negligence on the part of the plaintiff; and they returned a verdict for 30*l.*

A rule was subsequently obtained for a new trial, on the ground that the learned judge had not directed the jury what was in law sufficient to constitute delivery by a carrier, or what was the duty of the company at the end of a journey; and also on the ground that the verdict was against the weight of evidence.

Hume Williams, and *J. F. Torr*, shewed cause. They referred to *Butcher* v. *London and South Western Ry. Co.* (1), and *Richards* v. *London, Brighton, and South Coast Ry. Co.* (2).

(1) 16 C. B. 13; 24 L. J. (C.P.) 137. (2) 7 C. B. 839; 18 L. J. (C.P.) 251.

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J. Digby, and *Darling*, for the defendants, referred to *Shepherd* v. *Bristol and Exeter Ry. Co.* (1)

CLEASBY, B. It appears to me we ought not to make the rule absolute for a new trial in this case upon the ground either of misdirection or of the verdict being against the weight of evidence. The passage read by Mr. Digby from Redfield on Carriers appears to me to put the question in a very intelligible and convenient form. It is this (2): "It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and remove it within a reasonable time."

Now, there might be a case in which the question turned upon the second paragraph or sentence, "It is the owner's duty to call for and remove it within a reasonable time." There might be such a breach of duty on the part of the owner as to disentitle him, but I do not think that question arises in this case, for I think until the passenger has the opportunity of taking away his luggage it remains in the custody of the company. I should say the sole question in this case was whether the box was taken before the plaintiff had the opportunity of claiming it and taking it away. As far as regards any question of law to be laid down upon the subject, I should have no hesitation in saying that the mere throwing the box out upon the platform, mixed, as it might be, with other luggage, was not a delivery or a discharge of the defendants' obligation. It can hardly be contended that could be so; but it must be placed there and kept until the passenger has the opportunity of calling for it and receiving it. Then, if placing it upon the platform is not enough, was it taken away before anything had taken place in the way of delivery? If the matter had been put in that way to the jury, and they had found that it was taken before any delivery except the putting it upon the platform, it is impossible to say there was not evidence to justify them in coming to that conclusion; indeed it is plain the only conclusion one can come to is that the loss did happen in that way.

(1) Law Rep. 3 Ex. 189. (2) Redfield on Carriers, at p. 61.

In dealing with the question whether that was properly left to the jury, there is no doubt it was left to the jury generally. If one could see that what was left to the jury was, simply, whether the particular circumstances amounted to a delivery, I should have had a good deal of difficulty in saying that was the proper way of leaving it to the jury, but I take it the question left was not whether the circumstances amounted to a delivery, but what were the circumstances of the case, how it happened, and in that way it seems to me, coupled with the proper observations, which appear to have been made, the question was brought before the jury as to the time when this was taken away, when it ceased to be in the custody of the company. The question whether there was negligence on the part of the defendants is not really the question in the case, but if we find the conclusion the jury arrived at was that the box was taken away by reason of the negligence of the defendants, it follows from that they thought it was taken away while in the custody of the defendants, which is the question in the cause. It is rather an indirect way of asking it, but it appears to me to be the same question.

There is another question which the learned judge thought it prudent to leave to the jury, whether there was contributory negligence on the part of the plaintiff; but it appears to me that question is not properly raised in this case.

HAWKINS, J. The plaintiff's box came into the defendants' possession under circumstances that imposed upon them the duty to convey it to its destination, and deliver it to the plaintiff. That they conveyed it is clear, because the plaintiff saw it taken out of the van and put upon the platform. The remaining question is whether the defendants delivered the box to the plaintiff. Upon that part of the case I am clearly of opinion that upon this evidence, the jury having found the box was not delivered, we ought not to disturb the verdict. [The learned judge then dealt with the facts of the case, and continued:—]

There was one point discussed in the course of the argument about which I should like to say a word. The company are bound to deliver at the end of the journey, but that must be subject to this, that the plaintiff, the passenger, is ready and willing to

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receive within a reasonable time. I quite understand, if a reasonable time elapses for a passenger to take his luggage and he does not take it, he cannot complain and say the railway company are to be responsible if he does not take it within a reasonable time. If he does not take it away in a reasonable time the liability of the company as carriers is at an end. It is not necessary to determine that here, because I cannot see a particle of evidence suggesting that the plaintiff was not ready within a reasonable time to receive her box if that box had been there. I am of opinion, therefore, this rule should be discharged. I would add with reference to the case of *Richards* v. *London, Brighton, and South Coast Ry. Co.* (1), that Mr. Justice Williams says: "I express no opinion whether or not the defendants could be compelled to do more than deliver the luggage on the platform, but if the company chooses to provide a more convenient mode of delivering luggage to passengers, by employing porters to carry it across the platform to the vehicle by which it is to be taken away, I think their liability as carriers continues until the porters have discharged their duty." Here the defendants undertake to deliver the luggage on the platform, and they must keep it safely until a reasonable time has elapsed.

Rule discharged.

Solicitors for plaintiff: *Gorton & De Fivas.*
Solicitor for defendants: *R. R. Nelson.*

(1) 7 C. B. 839, at p. 860.

[IN THE COURT OF APPEAL.]

1878
Jan. 17.

BAKER *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PORTSMOUTH, ACTING AS URBAN SANITARY AUTHORITY.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 34—*Words—Construction of New Streets—Bye-law—Power to pull down Work done in Contravention of Bye-laws.*

By the Local Government Act, 1858, s. 34, power is given to every local board to make bye-laws with respect to the level, width, and construction of new streets, the structure of walls of new buildings, the sufficiency of space about buildings, and the drainage of buildings, &c.; and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power to the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws:—

Held, affirming the judgment of the Exchequer Division, that the power to make provision as to removing, altering, or pulling down buildings was not confined to bye-laws relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans.

APPEAL from the judgment of the Exchequer Division, in favour of the defendants, on demurrer to a statement of defence. (1)

Jan. 16. *Kingdon, Q.C.*, and *Petheram*, for the plaintiff.

Jan. 17. *Charles, Q.C.*, and *A. L. Smith*, for the defendants.

The arguments and the cases cited were the same as in the Court below.

Jan. 17. BRAMWELL, L.J. I am of opinion that the judgment must be affirmed. No doubt great power is given to sanitary authorities, the legislature thinking that it was tolerably certain that they would use those powers with discretion, and not tyrannically. We must, therefore, construe those sections and bye-laws without regard to consequences. I have come to the conclusion that the words of sub-s. 1, "with respect to the level, width, and construction of new streets," include the construction of the buildings, and the buildings themselves and front gardens, or whatever

(1) Ante, p. 4.

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else is at the side of the roadway. I have come to this conclusion not upon any authority, for I cannot see that any authority has any bearing upon the matter, except to shew that the word "street" may have such a meaning, but because it is the right meaning of the words. I think so for many reasons; first, because otherwise there is no power of regulating new buildings in new streets, if the sanitary authority cannot make such regulations under this clause. In the next place, the word "construction" is used, which is not a word which would be used in speaking of a street, as merely meaning a roadway, or a footway, or a carriage-way. The "construction" of a street is not a common expression; we speak generally of the construction of a house, or the laying out of a street; but, further, if we examine the general words after sub-s. 4, we find that "they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings." I think, therefore, sub-s. 1 refers to the buildings on the side of the street, as well as to the roadway. If this is so, I think the sanitary authority were right to say that until the street is approved of by them as a street, or I may say as a foot and carriage way, no building by the side of it should be erected. I must remark here, that the word "construct" in bye-law 3 does not refer to houses; it refers to streets, but whatever may be the language of the bye-law, it is not to be taken as a guide to interpret the statute. Nobody would suppose that streets would be half a century in the course of construction; we must treat the matter reasonably, and I can understand the sanitary authority saying, "Until we see what the street is, what its capacity is, and what it will be fit for, we direct that no buildings shall be erected upon it;" and I also think that there is another reason, namely, until this street is properly laid down with the drains and sewers and other necessary things, it would be inconvenient that any buildings should be erected upon it, or that it should be used for any purpose that would be prejudicial to health. I think, therefore, the sanitary authority had power to make that bye-law, and that alone would justify what they have done, for it must be admitted that buildings had been erected in contravention of the bye-law.

As to the other matter, the argument addressed to us as I understood was this: If a bye-law is made with a view to accomplish any of the objects specified in the four sub-sections, and then another bye-law is made to enforce the observance of the first bye-law, then those houses cannot be pulled down if they are built in contravention of the auxiliary bye-law; they can only be pulled down when built in contravention of the direct and first bye-law. I doubt whether such an argument has any application to the present case, because this statute contemplates one bye-law, that is, a bye-law under which the sanitary authority may arrange as to the deposit of plans, and as to their power to pull down and remove buildings built in contravention of the bye-law, and in my opinion these bye-laws form one bye-law, such as is contemplated by the statute. I think they have a right to say, "no one shall build until he has deposited plans, and if he does, his house shall be pulled down." For these reasons, the judgment of the Exchequer Division should be affirmed.

BRETT, L.J. I am of the same opinion. The defendants justify pulling down the houses in question by reason of a contravention of two bye-laws, the 3rd and 32nd. If either of the bye-laws, 3 or 32, be good, and if there has been a contravention of either of them, then that which has been done, by reason of bye-law 37, which is made to enforce the bye-laws, can be justified. The question which we have to decide is whether either bye-law 3 or bye-law 32 is good, and whether bye-law 37 which imposes the penalty or gives the right is also good; and, in order to determine this, we must ascertain the construction of the sub-sections of sect. 34 of the statute, and I am of opinion that the phrase "new streets" in sub-section 1 of sect. 34 includes the buildings by the side of a roadway as well as the roadway itself.

In the former Acts of Parliament there were specific enactments with regard to houses for sanitary purposes, which are repealed, and in place of them a power is given by the Act of 1858 to make bye-laws. That seems to me to shew that the legislature did not intend to take away any power of dealing with houses which already existed in the sections of the former Act, but to give a further power to deal with them, and they gave a defined power by

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statute to make bye-laws, not upon particular points, but in respect to particular points, which is a much larger phrase.

In so dealing with the matter, did the legislature intend by the term "new street" to exclude houses with regard to which there had been statutable notice formerly? I cannot think they did, and if there is nothing in the Act to shew that "new street" excludes houses, that then it ought to comprise houses. So far from thinking the phrase "new street" shuts out houses, I am inclined to think that the ordinary meaning of the word "street" does include the houses as well as the roadway. I incline to agree with what was said by Lord Chelmsford in *Galloway* v. *Mayor, &c., of London* (1) with regard to the ordinary meaning of the word "street"—that it does not mean the mere roadway, but a thoroughfare with houses on both sides; but whether that be so or not, we have here this distinction in phraseology. The legislature, when speaking of a street, speak of construction, and when they speak of a roadway, they use the words "lay out." I do not, however, say that "construction" in sub-s. 1 does not include the construction of the roadway. I think it does, but it is a word which is also applicable to the erection of buildings. It is a word which is applicable to the making of the roadway and of the buildings. Therefore, I think it is meant to apply to both; at all events there is nothing to exclude the view that the phrase "new streets" comprises buildings. No bye-law similar to the 3rd bye-law here could be good unless the words "new streets" in the 1st sub-s. of sect. 34 includes the buildings. I think that is very strong to shew that it does include the buildings as well as streets. If it does include buildings by the side of the new streets as well as the roadway, then the local board are entitled to make bye-laws with respect to the construction of the buildings by the side of the new street. Have they made such bye-laws? Now the third bye-law seems to me obviously one with respect to construction. It is that no building shall be erected until the street has been constructed to the approval of the local board. That seems to me to be a regulation made with respect to the construction of the buildings by the side of the new street. With regard to the bye-law 32, it has been argued that at all events that is not

(1) Law Rep. 1 H. L. C. at p. 55.

a bye-law made under any of the previous sub-sections, but is only made under the more general part of the sect. 34, and it was argued upon that, that although bye-law 32 might be good, yet it was not a bye-law made under any of the four sub-sections, but under the general part, and that bye-law 37 would be a bye-law not to enforce a bye-law made under any one of the four sub-sections, but a bye-law to enforce a bye-law made under the general part of the section. That is an argument which cannot prevail, for when we look at the general part of s. 34, it carries what is done under that general part into the sub-ss. 1, 2, 3, and 4. So that after those sub-ss. 1, 2, 3, and 4, which enable the board to make bye-laws, comes this: "And they may further provide for the observance of the same"—that is, for the bye-laws made—"by enacting therein"—that is, in those bye-laws which are made under the four sub-sections—"such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws."

Now it seems to me that the moment they have made bye-laws under the four first sub-sections properly, they may enact in those bye-laws the other provisions, and if they do, those provisions become part of those bye-laws. Now among those provisions they may enact provisions with regard to notice, the giving of notices, and the depositing of plans. If they do enact that, it is in the bye-laws made under the first four sub-sections, and it is part of those bye-laws, and may be enforced. It seems to me that bye-law 32 does enact, and all these bye-laws, although they are numbered, form one bye-law; and in the bye-laws they have properly made under sub-s. 1, as it seems to me, they have enacted in those bye-laws provisions with regard to giving notice; they have done that in bye-law 32. Bye-law 32, therefore, is as much a bye-law under sub-s. 1 as is bye-law 3. If that be so, then bye-law 37 gives them power to pull down the houses for contravention of the bye-law 3 and bye-law 32, both or either of them, both of which are properly made under sub-s. 1 of s. 34 of the Act of Parliament. For these reasons I think the board were justified in pulling down these

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houses. Whether they executed their powers harshly or not must depend upon other circumstances, with which we have nothing to do.

COTTON, L.J. I have no doubt that the power which the sanitary authority of Portsmouth has claimed to exercise is a very large power; it is to pull down a man's house after he has been at considerable expense in building it, and we ought to be satisfied that the legislature has given them such power. No doubt when they gave such power to sanitary authorities, the legislature thought they would exercise it judiciously for the general benefit of the public, and we must assume that has been done here. The only question for us is whether or no the statute does enable the defendants to say that this power has been given to them. I confess I had some doubt about it, but the argument has pretty well cleared away my doubt. If, however, it turned upon this question, whether or no, assuming the bye-law was not one made in respect of the matters referred to in the four sub-sections of the 34th section, I should desire further time for consideration, for I think there is a great deal in Mr. Petheram's argument; but I do not think it necessary to express any opinion upon that point, because my opinion is, that the third bye-law is a bye-law made with respect to the matters mentioned in the first sub-section of the 34th section of the Act.

Now, the question is really what is the meaning in the statute of these words, "with respect to the level, width and construction of new streets." I say the question is what is the meaning of that in the section of the statute? and then, is or is not this third bye-law a bye-law made with respect to the construction of new streets? Now, no doubt the word "street" is very ambiguous. What it means must be determined by looking at the context, and by seeing for what purpose the statute was passed, and with reference to what the new street is to be made. We must construe the statute, and then see whether whatever is done under the bye-law is within the power given by the statute. Now, looking at the words, "level and width," primâ facie they refer, no doubt, to the roadway. Then we have the construction of streets, and we must consider what is meant there by the word "street." Is it confined to the roadway, or does it not also include that which in one

sense is no doubt part of the street—the houses on both sides—just as a person might say he lives in a street, though in fact he lives in a house in a street.

Now, in dealing with this matter we are dealing with a power given to a body to whom the legislature has given the general control of the borough of Portsmouth, for the purpose not only of enabling them to direct that there shall be proper roadways—streets, but for the purpose of enabling them to control matters in reference to houses there, and in s. 35 (1) of the Act of Parliament there is an express power given to them to lay down what ought to be the line of buildings erected in those streets, if old buildings are pulled down and new ones put up. Now, that shews their powers are not intended to be confined to those matters in the construction of houses which are referred to in sub-sections 2, 3, and 4, which refer to the stability of structures, the sufficiency of air, and the general sanitary arrangements. They have power to put any limit upon the matter referred to in those three sub-sections as to the construction, the size, or the height of buildings in new streets. I think the fair meaning of the word "construction" of new streets in that first sub-section is not confined to the mere making of the streets, the mode in which the metalling is to be done and such things, but "the construction of new streets" surely means the making not only of the roadway, but all matters relating to the building of the houses which border on the street, and which in one sense are called part of the street. A construction of a new street must mean all that refers to the making of the roadway, and all that applies to the building of those houses which are in the street. The defendants have done nothing in excess of that bye-law in exercising their power and pulling down these houses. I think what they have done they were justified in doing.

Judgment affirmed.

Solicitors for plaintiff : *Saunders, Hawksford, & Bennett.*
Solicitor for defendants : *J. Howard, Portsmouth.*

(1) By 21 & 22 Vict. c. 98, s. 35, when any house or building has been taken down in order to be rebuilt or altered, the local board may prescribe the line in which any house or building to be hereafter built shall be erected, and the same shall be erected in accordance therewith. . . .

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[IN THE COURT OF APPEAL.]

MIRABITA *v.* THE IMPERIAL OTTOMAN BANK.

Contract—Sale of unascertained Goods—Goods, Passing of Property in—Bill of Lading, Goods deliverable to Order.

P. shipped 600 tons of umber upon a vessel chartered for the plaintiff. The bills of lading made the umber deliverable to the order of P. or assigns. The plaintiff insured the umber. A bill of exchange drawn by P. on the plaintiff which had been discounted by the defendants' bank, to whom the bills of lading had been transferred, having been refused acceptance, a second bill was drawn by P. to the order of C. on the plaintiff, and was given to the defendants in exchange for the first bill, upon the terms that the plaintiff should accept and pay the second bill against the delivery of the bill of lading. The umber and the bill of exchange reached their destination at the same time, but the plaintiff declined to accept the bill. The umber was, therefore, entered at the Custom House in the defendants' name. Subsequently the plaintiff tendered the amount of the bill of exchange and demanded the bill of lading, but the defendants refused to give up the bill of lading; the plaintiff offered a guarantee for the freight, which offer was not accepted by the defendants, and they sold the cargo:—

Held, in an action by the plaintiff for the value of the umber so sold by the defendants, that the property in the umber passed to the plaintiff, and that, therefore, the plaintiff was entitled to recover.

Appeal from the judgment of the Exchequer Division, in favour of the plaintiff on a special case stated by an arbitrator. (1)

The plaintiff is a merchant carrying on business at Malta and Constantinople. The defendants are a banking company incorporated by a firman of the Sultan, and carrying on business at Constantinople with agencies at London and Larnaca.

On the 26th of June, 1873, a contract was made between the plaintiff and Phatsea & Pappa, a firm at Larnaca, for certain umber to be sold to and shipped for the plaintiff by Phatsea & Pappa at Larnaca.

On the 7th of July, 1873, the plaintiff wrote to Phatsea & Pappa stating that he would send ships on receiving advice of the quantity of umber ready for shipment, and also that the bills of lading must state that Phatsea & Pappa shipped the umber "by order and on account of the plaintiff."

On the 26th of August, 1873, Phatsea & Pappa had 600 tons of

(1) The action was commenced before the Judicature Acts came into operation.

umber ready for delivery and shipment under the contract, and they chartered by order of the plaintiff and for his account a British ship, the *Princess of Wales*, then lying at Alexandria, to carry a cargo of such umber from Larnaca to London. The plaintiff approved of the charterparty. The *Princess of Wales* proceeded to Larnaca, where she took on board a cargo of 600 tons of umber. About the 9th of October the plaintiff sent 150*l.* to Phatsea & Pappa for ship's advances, of which sum 70*l.* was paid to the master.

On the 9th of October the master signed four bills of lading for the cargo, which stated the goods to be shipped by Phatsea & Pappa, and to be delivered "to order or assigns." The bills of lading were given to Phatsea & Pappa.

On the 10th of October the *Princess of Wales* sailed from Larnaca, and on the 14th of October Phatsea & Pappa informed the plaintiff by telegram that the vessel had left with 600 tons on the 10th instant; that they would shortly receive bills of lading and draft at sixty days, and requesting them to insure the cargo. The plaintiff communicated with his son, F. Mirabita, trading in London as Mirabita Brothers, and through him effected an insurance on the cargo.

Phatsea & Pappa drew a bill of exchange for 280 Turkish liras on the plaintiff, and indorsed and handed it with the bills of lading to Corkji, from whom they had bought the umber which formed the cargo. Phatsea & Pappa had paid Corkji for the umber, and they handed them the bill of exchange by way of accommodation, to enable him to obtain an advance from the defendants and in anticipation of future supplies of umber.

Corkji discounted the bill of exchange at the Larnaca agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople, and given up to the plaintiff on payment by him of the bill of exchange at maturity.

The Larnaca agency forwarded the bill of exchange and bills of lading to their bank at Constantinople, Pappa having come to Constantinople and handed to the plaintiff the charterparty and invoice of the cargo, which stated that the same was "shipped by order and on account of the plaintiff." The defendants' bank at

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Constantinople presented the bill of exchange to the plaintiff for acceptance, but he declined to accept without receiving the bills of lading. The bill of exchange and the bills of lading were then returned to the Larnaca agency. The plaintiff afterwards offered to the defendants' bank at Constantinople to pay the bill of exchange before maturity on receipt of the bills of lading, but in consequence of the documents having been returned to Larnaca this offer could not be accepted.

It was then arranged between the plaintiff and Pappa that a new bill of exchange for 254*l.* 11*s.* should be drawn by Phatsea & Pappa to the order of Corkji on Mirabita Brothers in London at two months' date, which should be substituted for the former bill for 280 Turkish liras, and notice of the agreement was given to the defendants' bank at Constantinople.

A new bill of exchange, dated the 9th of October, 1873, was, in accordance with the terms so agreed, drawn by Phatsea & Pappa and sent by them to Corkji, who handed it to the Larnaca agency, saying that it was to be sent with the bills of lading to London, where Mirabita Brothers would be ready to accept and pay the bill of exchange at maturity against delivery of bills of lading. The Larnaca agency accordingly gave up the first bill of exchange, and on the 20th of November, 1873, forwarded the bill for 254*l.* 11*s.* to their agency in London, and directed them "to give up the bills of lading on payment of the inclosed bill of exchange."

At the time of making the agreement with the plaintiff for the drawing of the bill of exchange for 254*l.* 11*s.*, as already mentioned, it was doubtful whether the bills of lading would reach England before the arrival of the ship. Pappa thereupon gave the plaintiff a letter, addressed to the master of the *Princess of Wales*, to be used in case the ship should arrive in England before the bills of lading, which letter purported to authorize the master, if the bills of lading had not come to hand, to deliver the cargo to the plaintiff.

On the 3rd of December the *Princess of Wales* reached Gravesend, and was ordered to the Millwall Docks by F. Mirabita.

On the same day the bill of exchange for 254*l.* 11*s.*, together with the bills of lading, was delivered by post, and in the course

of the day was left at the office of Mirabita Brothers, with the following note attached: "Bill of lading for Terra umber, weighing 600 tons, per *Princess of Wales*, to be given up against the payment of attached draft, 254*l.* 11*s.*, on Mirabita Brothers."

F. Mirabita returned the bill of exchange to the defendants' London agency, stating that he was ready to pay the bill at maturity, but he did not then accept it.

On the 8th of December the defendants' London agency gave orders to the ship's brokers to enter cargo in the name of the bank, and on the 12th the cargo was entered at the Custom House in the defendants' name; but the defendants took no other steps towards taking possession of the cargo till after the 20th of December.

On the 12th of December F. Mirabita called on the defendants, and offered to pay the bill and receive the bills of lading. The defendants' manager refused to accept payment, alleging that they had taken possession of the cargo and thereby had made themselves liable for freight. They had done nothing to take possession of the cargo or to make them liable for freight.

On the 18th of December F. Mirabita again offered to pay the bill of exchange and to give a guarantee for the freight. After some further negotiation the defendants landed the cargo, and after heavy charges for demurrage, landing, and other expenses had been incurred, sold the cargo in bulk, without any authority from the plaintiff or F. Mirabita, for a sum which was not sufficient to pay the amount of the bill of exchange, freight, and expenses; the cargo was worth more than the amount of the bill of exchange, freight, and expenses, and if the plaintiff had obtained possession of it he would have made a profit therefrom.

So far as it was a question for the jury, the arbitrator found as a fact that it was the intention of Phatsea & Pappa and of the plaintiff that the property in the cargo of umber should pass to the plaintiff upon its shipment on board the *Princess of Wales*, subject to a lien on the same for payment of the price; and their intention that the property in the cargo should be vested in the plaintiff continued from the time of shipment until the arrival of the ship in England.

The Court is to be at liberty to draw inferences of fact, and to

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disregard the above finding, if a jury would not have been justified in coming to such a conclusion from the facts above stated. The question was whether the plaintiff is entitled to recover damages from the defendants for their dealing with the cargo as above mentioned.

Jan. 17. *Matthews, Q.C.*, and *Arthur Wilson*, for the defendants, contended that the umber not being specific and the vendors having on shipment of it taken the bill of lading to their own order, the property in the umber did not pass to the plaintiff, and that therefore he could not maintain the action. They cited or relied on the following authorities: *Wait* v. *Baker* (1); *Turner* v. *Trustees of the Liverpool Docks* (2); *Van Casteel* v. *Booker* (3); *Ellershaw* v. *Magniac* (4); *Shepherd* v. *Harrison* (5); *Ogg* v. *Shuter* (6); *Gabarron* v. *Kreeft* (7); and *Jenkyns* v. *Brown.* (8)

Jan. 22. *M. White, Q.C.*, and *Archibald*, for the plaintiff, cited Benjamin on Sales, bk. 2, ch. 5, p. 265 (2nd ed.); *Browne* v. *Hare* (9); *Coggs* v. *Bernard* (10); *Ratcliff* v. *Davies* (11); *Van Casteel* v. *Booker* (3); *Wood* v. *Bell* (12); and *Joyce* v. *Swan.* (13)

Arthur Wilson was heard in reply.

Cur. adv. vult.

Feb. 18. The following judgments were delivered:—

BRAMWELL, L.J. This case has been argued on the footing that the law of England or a like law is applicable, and we must so deal with it. We must treat as the governing bargain between the plaintiff and Phatsea & Co., the one made at the time it was arranged that the payment should be made by a bill at two months, and that the vendees should not be entitled to the 600 tons of umber, or bills of lading of them, until payment of the bill of exchange. No question arises as to the defendants' rights; for it was admitted, and properly admitted, that the defendants

(1) 2 Ex. 1.
(2) 6 Ex. 543; 20 L. J. (Ex.) 393.
(3) 2 Ex. 691; 18 L. J. (Ex.) 9.
(4) 6 Ex. 570 n.
(5) Law Rep. 5 H. L. 116.
(6) 1 C. P. D. 47.
(7) Law Rep. 10 Ex. 274.
(8) 14 Q. B. 496.
(9) 4 H. & N. 822; 29 L. J. (Ex.) 6.
(10) 1 Sm. L. C. 4th Ed. p. 171, citing *Kemp* v. *Westbrook*, 1 Ves. 278.
(11) 2 Cro. Jac. 244.
(12) 6 E. & B. 355.
(13) 17 C. B. (N.S.) 84.

did wrong in refusing the amount of the bill, and selling the umber. On the other hand, there is no contract between the plaintiff and the defendants. So that in the result the case is reduced to this: When the defendants tortiously disposed of the umber, had the plaintiff such a property therein, or right thereto, as to entitle him to maintain this action? It is argued that he had not, and the reason given is, that as the umber was not specific and ascertained, and as on shipment the shippers took a bill of lading to order, and gave an interest in it to Corkji, who transferred it to the defendants, no property passed; and for this a long series of authorities, beginning with *Wait* v. *Baker* (1) and ending with *Ogg* v. *Shuter* (2), is cited. It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a jus disponendi. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor. This appears from *Wait* v. *Baker* (1); *Gabarron* v. *Kreeft* (3); and to some extent from *Ellershaw* v. *Magniac* (4). In the first case, Parke, B., expressly says that the vendee Baker could under the circumstances maintain an action against Lethbridge for having sold the barley to Wait. This property or power exists then; and therefore if the vendors of the umber had sold it to the defendants this action would not be maintainable. But in that case the defendants would have acquired a right, while, as I have said, it is admitted that no right in them can be relied on. I think it is not necessary to inquire whether what the shipper possesses is a property, strictly so called, in the goods, or a jus disponendi, because I think, whichever it is, the result must be the same, for the following reasons. That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the contract they are at his risk. If lost or damaged, he must bear the loss. If specially good, and above the average quality which the seller was bound to deliver, the benefit is the vendee's.

(1) 2 Ex. 1.
(2) 1 C. P. D. 47.
(3) Law Rep. 10 Ex. 274.
(4) 6 Ex. 570.

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If he pays the price, and the vendor receives it, not having transferred the property, nor created any right over it in another, the property vests. It is found in this case that as far as intention went the property was to be in the plaintiff on shipment. If the plaintiff had paid, and the defendants had accepted the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any delivery. None might have been made; the defendants might have wrongfully withheld the bills of lading. The property would have vested by virtue of the original contract of sale. It follows that it vested on tender of the price, and that whether the vendor's right was a right of property or a jus disponendi; for whichever it was it was their intention that it should cease on the plaintiff's paying the price, and therefore it would cease unless meanwhile some title had been conferred on a third person to something more than the price. This, though wrongful as regards the plaintiff, would have been valid. But no such title exists here. There is nothing in the authorities inconsistent with this. The only case that may be thought to seem so is *Wait* v. *Baker* (1), where, though the vendee tendered the price, he was held to have acquired no property. But it is manifest that in that case the vendor originally took the bill of lading to order, and kept it in his possession, to deal with as he thought fit, and never intended that the property should pass until he handed the bill of lading to the vendee on such terms as he choose to exact. Parke, B., says: "There is no pretence for saying that Lethbridge agreed that the property should pass." "There was nothing that amounted to an appropriation, in the sense of that term, which alone would pass the property." "There was no agreement between the two parties that that specific cargo should become the property of the defendant," the vendee. Here all the evidence shews that there was such an agreement. The arbitrator says it existed in fact at the time of shipment, but the subsequent conduct of both parties shews it. What seems decisive is this: the plaintiff must have a right against some one; has he any against Phatsea? Now Phatsea has done nothing that he had no right to do, and he has done everything he was bound to do, treating the altered agreement as governing.

(1) 2 Ex. 1.

No action therefore would lie against him. It must then be the defendants who are in the wrong. I think they are, that the property was to pass on payment, and consequently on tender of payment, of the bill of exchange; that the bill of lading was handed to the Larnaca Bank to be delivered to the plaintiff on payment of the bill of exchange; that therefore the plaintiff can maintain this action, and the judgment should be affirmed. I would add that I agree with the reasoning of my brother Cleasby in the Court below; and I would further remark that I believe this is a question which would not have been open to the slightest doubt if the action had been brought after the coming into operation of the Judicature Acts. Cotton, L.J., has favoured me with a perusal of his judgment, and I entirely agree with it.

COTTON, L.J. In this case the vendors on shipping the goods, the subject of the contract, took a bill of lading requiring the delivery of the goods to be to their order, and dealt with that bill of lading in this way in order to secure payment of the bill of exchange which they then drew on the plaintiff. The bill of exchange was discounted with the defendants, and the bill of lading was transferred to them as security for the payment of the bill of exchange; this bill of exchange having been refused acceptance, a second bill of exchange was drawn and given in lieu of the first bill, upon the terms of the delivery of the bill of lading to the plaintiff upon payment of the second bill of exchange, and in so dealing with the bill of exchange the vendors intended that upon payment, the plaintiff, the purchaser, should obtain the goods, and they agreed, and, as far as they could, transferred to the purchaser their right to insist that on payment of the bill of exchange the bill of lading should be handed over.

I mention those facts for the purpose of adding this: that the action was instituted before the passing of the Judicature Acts, and therefore it is simply to be dealt with as a legal question; and we cannot inquire here how far the plaintiff has the right in equity to insist that he occupies the same position as the vendors, and to insist that as against the pledgee of the bill of lading the plaintiff, as transferee of the right, has a good equitable title, even if he has not a legal title. In fact in the present case it simply

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turns on this question, whether the property in the goods in question has, under the circumstances, passed to the plaintiff.

Now I quite agree with the judgment of Bramwell, L.J., but as several cases were cited in the argument which it was contended were adverse to the ground of our decision, I think it better to state what I consider to be the principle of those decisions, and to point out how far that principle is applicable to such cases as this: Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Wait* v. *Baker* (1), *Ellershaw* v. *Magniac* (2), and *Gabarron* v. *Kreeft* (3), (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or

(1) 2 Ex. 1. (2) 6 Ex. 570. (3) Law Rep. 10 Ex. 274.

tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *Trustees of Liverpool Docks* (1); *Shepherd* v. *Harrison* (2); *Ogg* v. *Shuter* (3). But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser.

Apply these principles to the present case. Pappa did not attempt to make use of the power of disposition which he had under the bill of lading for the purpose of entirely withdrawing the cargo from the contract. He dealt with it only for the purpose of securing payment of the price. It is expressly stated in the special case that Mr. Corkji, who acted for Pappa, discounted the said bill of exchange at the agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople and given up to the plaintiff on payment of the bill of exchange at maturity.

Under these circumstances there was an appropriation by the vendors of the cargo subject only to payment of the price. This was tendered, and as it is conceded that the defendants were wrong in claiming anything more, the plaintiff, the purchaser, had done or offered to do all that was incumbent on him to make the appropriation absolute, and the property vested in him.

BRETT, L.J., concurred that the judgment of the Exchequer Division must be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Stocken & Jupp.*
Solicitor for defendants: *Clements.*

(1) 6 Ex. 543; 20 L. J. (Ex.) 393. (2) Law Rep. 4 Q. B. 196.
(3) 1 C. P. D. 47.

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Feb. 28.

[IN THE COURT OF APPEAL.]

BISSICKS *v.* THE BATH COLLIERY COMPANY, LIMITED.
Ex Parte BISSICKS.

Sheriff—Fieri Facias—Poundage—Seizure.

A sheriff's officer in the execution of a warrant of fi. fa. went with another man to the debtor's house, shewed him the warrant and demanded payment, and told him that in default of payment the man must remain in possession, and further proceedings would be taken; the debtor then paid the sum demanded in the warrant, which included poundage and officer's fee:—

Held, that there had been seizure upon the fi. fa., and that the sheriff was entitled to poundage.

Appeal by the plaintiff from the decision of the Exchequer Division, discharging an order calling on the sheriff of Bristol to shew cause why he should not return the sum of 2*l.* 12*s.* received by him for poundage and fees. (1)

The facts are set out in the report of the proceedings before the Exchequer Division, and the only additional circumstance necessary to be mentioned is that, before the sheriff's officer came to the plaintiff's shop, the plaintiff had sent the amount of the costs to London to be paid to the defendants.

Feb. 21. *Meadows White, Q.C.*, for the plaintiff. It must be admitted, after the decision in *Mortimore* v. *Cragg* (2), that the sheriff is entitled to poundage if he recovers by seizure the amount mentioned in the fieri facias, although no sale takes place; but it is contended for the plaintiff that there was no seizure at all. The facts in this case resemble those in *Nash* v. *Dickenson* (3), and *Colls* v. *Coates* (4) shews that unless the sheriff takes possession of the goods of the execution debtor he is not entitled to poundage.

McKellar, for the sheriff.

Cur. adv. vult.

Feb. 28. Bramwell, L.J. I think that, in order to entitle the sheriff to poundage, there must be a seizure. I am aware that

(1) 2 Ex. D. 459.
(2) 3 C. P. D. 216.
(3) Law Rep. 2 C. P. 252.
(4) 11 Ad. & E. 826.

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the only result of our holding, that there must be a seizure, will be that a sheriff's officer upon entering a house to execute a fieri facias will say that he seizes everything therein: but we cannot get over the current of authority that there must be a seizure. The question is whether, upon the facts, there was a seizure; the Lord Justice Brett is strongly of opinion that there was a seizure; the Lord Justice Cotton feels some doubt. I also feel some hesitation, but upon the whole I think there was a seizure, for the officer did threaten to leave a man in possession. The appeal will be dismissed.

BRETT, L.J. I agree that there must be a seizure; but upon the facts I think there was a seizure. The sheriff's officer went to the plaintiff's house with a man, he obtained entry into the house, and whilst he was there the plaintiff's goods were under his control; he spoke as if he had made a seizure, and he treated what he was doing as if it was a seizure; and the plaintiff also treated it as a seizure; although he had previously paid the amount of the costs, he paid it again, because he considered it a seizure; and, in ordinary language, he paid the sheriff out. For the reasons which I have given, I think there was a seizure; the proceedings of the officer were treated by both parties as a seizure.

COTTON, L.J. I adhere to the doctrine that there must be a seizure before poundage can be claimed. I have felt some doubt, but on the whole I think there was a seizure; for if the money had not been paid, the officer would have left the man in possession of the plaintiff's goods.

Appeal dismissed.

Solicitors for plaintiff: *Mead & Daubeny.*
Solicitors for sheriff: *Guscott, Wadham, & Daw.*

1878
May 3.

BARNES, Appellant; CHIPP, Respondent.

Adulteration of Food and Drugs—Analysis of Article—Notification to Seller condition precedent to Prosecution—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 14, 20, 21.

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), enacts, by s. 6, that "no person shall sell to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser," under a penalty; and by s. 14, inter alia, that "the person purchasing any article with the intention of submitting the same to analysis, shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst." Sects. 20 and 21 regulate the proceedings for the recovery of penalties before justices in a summary manner.

A police constable, by the direction of the inspector of weights and measures, bought gin from the barmaid of an inn with the intention of submitting it to analysis. He then told her that he was a police constable, and that he had purchased the gin for the purpose of analysis, but did not add "by the public analyst." The inspector afterwards had the gin analysed by the public analyst, and obtained his certificate that it was diluted, and the innkeeper was prosecuted under ss. 20 and 21, and summarily convicted of an offence against s. 6:—

Held, that the notification required by s. 14 was a condition precedent to a prosecution under the Act, and that the conviction must be quashed.

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden in the city of Gloucester on the 4th and 11th of January, 1878, an information was heard, which had been preferred by the respondent against the appellant under s. 6 of 38 & 39 Vict. c. 63, for selling to the prejudice of Bowen the purchaser certain food, to wit one half pint of gin, which was not of the nature, substance, and quality demanded by Bowen.

The following facts were proved on the part of the respondent. On the 25th of September, 1877, Bowen, a police constable stationed and residing at Gloucester, but not appointed by the local authority, went by the direction of the respondent, who is inspector of weights and measures for the city of Gloucester, to the appellant's house, known as the Bell Inn, situate in the city, and asked the barmaid to supply him with half a pint of gin, which was supplied to him in a measure, and for which he paid her 10*d*. He then told her that he was a police constable, that he had purchased the gin for the purpose of analysis (but did not add "by the public

analyst"), and that if she liked he would divide it (but did not add "into three parts"), and give her a portion, but she did not require it. He then put it into a bottle, which was labelled "16," corked it, and sealed it with the county seal in the presence of the barmaid, shewed it to her, and asked her to make any mark she liked for the purpose of identification, which she declined to do. He then took the bottle to the police station, and handed it to the respondent in the same state. On the 9th of October, 1877, the respondent took the bottle in the same state, and handed it to Mr. John Horsley, the analyst appointed for the city of Gloucester, who does not reside within two miles of Bowen's residence, but resides at Cheltenham, nine miles from Gloucester. On the same day Horsley analysed a portion (about one-fourth) of the contents of the bottle. It contained seventy-four parts of water and twenty-six parts of spirit, and was fifty under proof, and was diluted. Horsley drew the cork, and with the same cork corked up the remainder of the contents of the bottle (but did not seal it), and locked it up in a cupboard in his laboratory, to which no one but himself had access. He gave his certificate of the result of the analysis to the respondent on the 21st of December, 1877, and the respondent laid the information on the 31st. Horsley sealed the bottle on the 7th of January, 1878, and not before, and delivered it back to the respondent on that day. He never divided the contents of the bottle into two parts, other than by taking out a portion and analysing it.

No evidence was given as to the proper ingredients to be used in the manufacture of gin, nor as to the proper or usual strength at which gin ought to be sold; but it was found as a fact that the gin sold to Bowen was not of the quality demanded by him.

It was contended on the part of the appellant, 1st, that under s. 13 of the Act the person procuring a sample of food for the purpose of being analysed must be a medical officer of health, an inspector of nuisances, an inspector of weights and measures, an inspector of markets, or a police constable appointed by the local authority; and that as Bowen was none of these, the proceedings must fail. 2ndly, that s. 14 had not been complied with, as Bowen did not notify his intention to have the gin analysed by the public analyst, and did not offer to divide it into three parts, and

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that in consequence of such non-compliance the proceedings must fail. 3rdly, that s. 15 had not been complied with, as the analyst did not divide the gin into two parts, and did not seal or fasten up one of those parts and cause it to be delivered to the purchaser, either upon receipt of the sample, or when he supplied his certificate to the purchaser, and that in consequence of such non-compliance the proceedings must fail. 4thly, that the purchaser did not himself take the gin to the analyst, nor send it by post in manner provided by s. 16, and that in consequence of his not doing so the proceedings must fail.

The justices being of opinion—1st, that under s. 12 any person may purchase an article of food and submit it for analysis, and also that an officer, inspector, or constable, under s. 13, is entitled to procure a sample, either himself or by deputy; 2ndly, that s. 14 had been sufficiently complied with by the purchaser stating that he had purchased the gin for the purpose of analysis, and offering to divide it, although he did not mention the public analyst, or offer to divide the gin into three parts; 3rdly, that it was immaterial whether ss. 14 and 15 were strictly complied with or not, compliance with these sections not being a condition precedent to a prosecution under s. 20 (which only requires that the analyst, having analysed the article, shall have given his certificate of the result, from which it appears that an offence has been committed); 4thly, that it is not requisite that the article purchased should either be handed to the analyst by the purchaser himself or forwarded to him by post under s. 16—convicted the appellant of the offence charged, and adjudged him to pay a penalty of 10s. and costs.

The questions of law for the opinion of the Court were—

1st. Whether in proceedings for a penalty under s. 6 (1), the

(1) By s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63): "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*. . . ."

By s. 12 "any purchaser of an article of food or of a drug" is entitled on payment of a certain sum to have the article analysed by the analyst appointed under the Act, and to receive from him a certificate of the result of his analysis.

By s. 13: "Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at

person purchasing the article of food must be an officer, inspector, or constable, mentioned in s. 13, or whether he may be one acting

the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act shall submit the same to be analysed by the analyst of the district or place for which he acts, or if there be no such analyst then acting for such place to the analyst of another place, and such analyst shall upon receiving payment as is provided in the last section, with all convenient speed analyse the same and give a certificate to such officer wherein he shall specify the result of the analysis."

By s. 14: "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analysed, to the analyst."

By s. 15: "If the seller or his agent do not accept the offer of the purchaser to divide the article purchased in his presence, the analyst receiving the article for analysis shall divide the same into two parts, and shall seal or fasten up one of those parts and shall cause it to be delivered, either upon receipt of the sample or when he supplies his certificate, to the purchaser, who shall retain the same for production in case proceedings shall afterwards be taken in the matter."

Sect. 16 regulates the mode of sending articles to the analyst if he does not reside within two miles of the residence of the person requiring the article to be analysed.

Sect. 17 imposes a penalty on a person exposing any article for sale who refuses to sell the same to any officer, inspector, or constable, &c.

Sect. 20 is headed "Proceedings against offenders," and enacts: "When the analyst, having analysed any article, shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence before any justices in petty sessions assembled, having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner. . . ."

By s. 21: "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness; and the parts of the articles retained by the person who purchased the article shall be produced, and the defendant may, if he think fit, tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly."

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under the direction of such officer, inspector, or constable, or any other person.

2nd. Whether on the facts stated, s. 14 was sufficiently complied with.

3rd. Whether on the facts stated, s. 15 was sufficiently complied with.

4th. Whether it is requisite, looking at s. 20, that before a person can be convicted, both ss. 14 and 15 (or one of such sections), must have been strictly complied with.

5th. Whether it is requisite that the article of food purchased should either be taken by the purchaser personally to the public analyst, or forwarded by post to such analyist under s. 16.

If the Court should be of opinion that the conviction was legally and properly made, and the appellant is liable as aforesaid, the conviction to stand, but if the Court should be of opinion otherwise the complaint to be dismissed.

Bosanquet, for the appellant. The appellant does not rely on the point raised by the 1st question. As to the 2nd question, whether compliance with every requirement of ss. 14 and 15 be a condition precedent to a prosecution under the Act, or not, at all events, the purchaser of an article cannot prosecute unless he has, under s. 14, notified "to the seller or his agent selling the article his intention to have the same analysed by the public analyst." The object of this section is that the seller may have full warning of the intention to prosecute, and the case to be brought against him, in order that he may be able to meet it. In the present case the purchaser only told the seller that he had bought the gin for the purpose of analysis, and the seller might suppose the analysis was for the private information of the purchaser, or some one instructing him. The procedure on the prosecution is prescribed by ss. 20 and 21, which, by necessary implication, refer to the preceding sections. The purchaser failed also to comply with the provision of s. 14, which requires him to offer to divide the article into three parts, &c., for he only offered to divide it. Further, the provisions of s. 15 were not complied with.

[PER CURIAM. It will be unnecessary to consider any further questions if we hold that the notification to the seller of the

purchaser's intention to have the article analysed by the public analyst is a condition precedent to prosecution. We therefore desire to hear that question argued for the respondent.]

Jelf, for the respondent. No doubt Bowen purchased the article "with the intention of submitting the same to analysis;" but a prosecution may be instituted under s. 20, independently of s. 14. The offence of selling an article of food or a drug, which is adulterated, is created by s. 6. By s. 12, any purchaser of an article of food, or a drug, is entitled to have it analysed by the public analyst, and to receive a certificate of the result of the analysis, without telling the seller anything at all. Why should not a purchaser, after complying with s. 12, prosecute immediately under s. 20? Sect. 20 speaks no doubt of the analyst and his certificate, but that may refer to a certificate obtained under s. 12, just as naturally as to one obtained under ss. 14 and 15, and there is no need to resort to ss. 14 and 15 in order to give full meaning to ss. 20 and 21. If compliance with every one of the many requirements of ss. 14–16 is a condition precedent to prosecution, the statute will be practically a dead letter, for it will be almost impossible to prove compliance. Those sections are directory merely, and the justices acted on that view: but they only desire a decision for their guidance.

KELLY, C.B. I entertain no doubt upon this point, for I think these words do not admit of any question. Sect. 14 says, "that the person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst." Mr. Jelf in effect asks us to strike those words out. When we look at s. 21 we see that the production of the certificate of the analyst is to be sufficient evidence of the facts therein stated, unless the defendant requires the analyst to be called. In order to see how that certificate is to be obtained we must look at the preceding sections. This is a penal Act, and would lead to great injustice if this provision in s. 14, which is intended for the benefit of the seller, might be disregarded where the person selling is, as in the present case, an ignorant barmaid. On the ground

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of convenience, as well as by the very terms of the statute, I think the notification required by s. 14 is a condition precedent to a prosecution under the Act.

POLLOCK, B., concurred.

Conviction quashed with costs.

Solicitor for appellant: *E. Sweeting, for Chesshyre, Cheltenham.*

Solicitor for respondent: *J. M. Weightman, for Philip Cooke, of Gloucester.*

Feb. 25.

[IN THE COURT OF APPEAL.]

BETTS *v.* THE GREAT EASTERN RAILWAY COMPANY.

Superfluous Land—Land not immediately available for the purposes of the Railway, but bonâ fide retained for such purposes—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 127.

Land which is taken compulsorily by a railway company for the purposes of their Act, and which is bonâ fide retained by them with a reasonable expectation of using it for such purposes, does not at the expiration of ten years from the time fixed for the completion of the works vest in an adjoining owner as superfluous land under the Lands Clauses Consolidation Act, 1845, s. 127, merely because, from insufficiency of traffic, or from want of funds, the company cannot immediately apply it to such purposes, although it is in the meanwhile let out to yearly tenants, and applied to purposes, for which it is in its then condition suitable.

THIS was an appeal from a decision of the Court of Exchequer, pronounced upon the 6th of June, 1873, discharging a rule granted on the 4th of November, 1870, to enter a verdict for the plaintiff or for a new trial. The facts are stated in the report of the proceedings before that Court (1), and it will be sufficient here to make the following statement of them.

The action was brought by the adjoining owner to recover certain small pieces of land contiguous to the Great Eastern Railway, which had been compulsorily taken under the Acts, pursuant to which the railway was made. The time limited for the completion of the railway expired in 1851.

(1) Law Rep. 8 Ex. 294.

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On the trial of the cause before Channell, B., at the Norfolk Summer Assizes, 1870, it was proved that the land in question (with the exception of a small triangular piece) was a narrow strip, running along the east side of the railway, and immediately adjoining Diss station; it was divided by fences into five plots, containing respectively, 0*a*. 3*r*. 13*p*., 0*a*. 2*r*. 1*p*., 0*a*. 3*r*. 21*p*., 0*a*. 0*r*. 14*p*., and 1*a*. 3*r*. 14*p*. The plot of 0*a*. 3*r*. 13*p*. abutted upon the road from Diss to Scole; its breadth was greatest next this road, and the company had intended to erect here a gate-house and a weighing machine; it had been intended to use it to make a road leading from the road between Diss and Scole to the plot of 0*a*. 2*r*. 1*p*.; but from want of funds the road had not been made, and the land had been let for pasture. The plot of 0*a*. 2*r*. 1*p*. had been used by the company as a "lair" for cattle coming by the line, and for depasturing horses of the company used at the station. At the south-west corner of the plot of 0*a*. 3*r*. 21*p*. stood a coal-shed surrounded by a fence, which had been let to one, Quadling. Upon the east side of this shed, between it and the plaintiff's land, ran a roadway leading from the plot of 0*a*. 2*r*. 1*p*., and then going in a curved line to the station; it was used for the purpose of driving cattle to the lair. The middle portion of the plot of 0*a*. 3*r*. 21*p*. was occupied by another coal-shed, also let to Quadling, by granaries and a beer-house let to tenants; but it was understood that the company might resume possession of them on paying compensation; the north portion of this plot was unoccupied. The plot of 0*a*. 0*r*. 14*p*. was used as a garden, and that of 1*a*. 3*r*. 14*p*. for growing turnips and other crops; they were wanted to make a road to the station from the north, and the latter plot was also wanted for the construction of sidings; the line here passed through a cutting which was in parts twenty feet below the surface; but through want of funds these works had not been carried out. The small triangular piece contained 0*a*. 1*r*. 3*p*., and part of it formed the site of an old road, which had been diverted without due authority; and the defendants were doubtful whether they might not be compelled to restore the old line of road. The verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for him.

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The appeal was in the form of a case "stated pursuant to the provisions of the 39th section of the Common Law Procedure Act." The case concluded thus: "The plaintiff appeals from the decision and rule of the 6th of June, A.D. 1873, and the question for the opinion of the Court of Appeal is, whether the said rule of the 4th of November, A.D. 1870, ought to have been discharged or ought to have been made absolute on all or any, and if so, then on which of the grounds therein stated.

"The Court of Appeal to make such rule upon this appeal as it may think fit, and to proceed thereon pursuant to the provisions of the Common Law Procedure Act, 1854."

Feb. 22, 23, 25. *Merewether*, *Q.C.*, and *Robert Williams*, for the plaintiff. So long as the judgment of this Court in *Hooper* v. *Bourne* (1) stands unreversed, it must be admitted that land which may within a reasonable time become useful for the purposes of the undertaking, is not superfluous, although it is not covered with the works of the company at the expiration of the period mentioned in the Lands Clauses Consolidation Act, 1845, s. 127: but the plaintiff is entitled to recover all the land which in 1861 the railway company intended to appropriate to objects unconnected with their undertaking; it was then their duty to make a survey of their property, and dispose of all that was not wanted.

With respect to the plot of 0*a*. 3*r*. 13*p*., it has always been used as pasture, and there is no real ground for saying that the company intended to make upon it a road to the cattle lair and a gate-house and weigh-house; there is no satisfactory evidence to support the finding of the jury. The plaintiff admits that he cannot recover the plot of 0*a*. 2*r*. 1*p*., because the company used it for purposes directly connected with their traffic, and, for the same reason, he must also abandon his claim to the roadway leading to that plot from the station; and as this roadway remains vested in the defendants, the plaintiff is not adjoining owner to the coal-shed surrounded by the fence: he must therefore give up all claim to it. But, except the roadway and this coal-shed, the whole of the plot of 0*a*. 3*r*. 21*p*. has vested in the plaintiff. The defendants were endeavouring to let the stables at the expiration of the ten

(1) 3 Q. B. D. 258.

years, and the other coal-shed was let to Quadling to be used for any purpose, to which he thought fit to apply it. The granaries and coal-sheds are not buildings required for the purposes of the undertaking; it is plain that their sites are superfluous. The plot of 0*a.* 0*r.* 14*p.* is cultivated as a garden, and has never been used for any purpose connected with the railway. The plot of 1*a.* 3*r.* 14*p.* is used for growing turnips and other crops, and is therefore merely agricultural land: the defendants allege that they require it for sidings; but its shape is inconvenient for that purpose, and moreover the height of portions renders it unsuitable. The suggestion of making a road upon these two plots is a mere after-thought, for the site of the intended road does not appear upon the earlier plans of the company's engineer. As to the small triangular piece, the circumstance that the defendants may require it to restore the road which they have wrongfully diverted, will not prevent it from becoming superfluous land; but at all events they can only require the site of the old road; the plaintiff is entitled to the rest of this piece.

A. Wills, Q.C. (*W. J. Metcalfe, Q.C.*, and *Austin Metcalfe*, with him), for the defendants.

[The Court intimated that they did not require to hear any argument on behalf of the defendants, except as to the plot of 0*a.* 0*r.* 14*p.*, and the plot of 1*a.* 3*r.* 14*p.*, and as to the small triangular piece.]

It is submitted that the only question which can be raised in this Court is, whether a verdict ought to have been entered by the Court of Exchequer for the plaintiff; the rule obtained in that Court was discharged upon the 6th of June, 1873, before the Supreme Court of Judicature Act, 1873, came into operation or even was passed; and although the Court of Exchequer Chamber would have had power to entertain the question of entering the verdict: Common Law Procedure Act, 1854, s. 34; yet in the present case it could not have granted a new trial, because the judges of the Court of Exchequer were unanimous in discharging the rule, and no leave to appeal was given: Common Law Procedure Act, 1854, s. 35. The language of the Supreme Court of Judicature Act, 1873, s. 22, as to pending business is very wide; but it does not confer a new right of appeal upon the present

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plaintiff. By the very terms of the case the plaintiff is limited to those grounds of appeal, which he might have urged before the Exchequer Chamber.

[The Court intimated that they wished to hear the argument for the defendants upon the merits.]

The jury found that the land was retained bonâ fide "for the purposes of the Act;" this is, in effect, a finding that it was "required" for the purposes of the undertaking; and the evidence was sufficient to support the verdict. As regards the plot of 0*a.* 0*r.* 14*p.* and the plot of 1*a.* 3*r.* 14*p.*, it is plain upon the evidence that in 1861 the company wanted them for the purpose of making an additional road to the station; and the latter plot was also wanted in order to make sidings for the increasing traffic of the railway. The small triangular piece was wanted, because the defendants might be compelled to restore the public road which had been diverted without due authority, and a portion of it would be needed in order to build the approaches to the bridge over the railway.

Merewether, Q.C., in reply. At the expiration of the ten years there was no reasonable prospect that any portion of the land in dispute would be required for the purposes of the undertaking, and therefore the decision of this Court in *Hooper* v. *Bourne* (1) does not assist the defendants; the mode in which they dealt with the land shews that they considered it superfluous; and their conduct is contradictory of the evidence adduced upon their behalf at the trial.

BRAMWELL, L.J. I wish to say that in the judgment which I pronounced in *Hooper* v. *Bourne* (1), I intended to intimate my entire concurrence with the decision in *Great Western Ry. Co.* v. *May.* (2) I think that in that case the House of Lords laid down a correct principle for determining what are superfluous lands.

I think that in a strict view of the law this action ought to be decided as the Court of Exchequer Chamber would have decided it, if the appeal had been brought before that Court, and if the Judicature Acts had not been passed; and I come to that conclusion upon general principles, upon a review of those statutes,

(1) 3 Q. B. D. 258. (2) Law Rep. 7 H. L. 283.

and also upon the very words of the special case at the beginning and end of it; but it is perhaps better not to look at the facts from a merely technical point of view, and I will proceed to say why I consider the verdict of the jury and the decision of the Court of Exchequer to have been right.

I think it plain that the plot of 0*a.* 2*r.* 1*p.* was required for the purposes of the railway, for it was kept by the company as a lair for cattle sent by the railway, and also for pasturage for horses used at the station; and in fact the plaintiff's counsel very properly admitted that judgment must be against him as to this plot.

Then arises the question whether the plot of 0*a.* 3*r.* 13*p.* is not wanted to make a road to this lair leading out of the road from Diss to Scole: the objection is that if the plot had been really wanted for that purpose, the road would have been made before the commencement of this action. It appears that the company received a small sum for the hire of the plot, and that they could manage for the time to do without the intended road; but it is plain that if the plaintiff were to offer them the agricultural value of the land, they would refuse it. It was objected on behalf of the plaintiff that the end of the plot nearest the public road is broader than the rest of it, and that a portion of that end cannot be wanted to make the intended road; the company allege that they propose to erect at the broader end a weighing machine and a gate-house. I do not think that the legislature intended that when a piece of land, taken as a whole, is wanted for the purposes of the railway, a discussion should be allowed whether small portions of it are superfluous; I do not think that if a railway company claim to retain a strip of land five yards wide for the purpose of making a road, when a width of four yards would be sufficient, an adjoining owner can recover as superfluous any portion of the strip of land. A court of justice must consider whether the land is substantially wanted; if it is, the company are entitled to retain the whole.

I now come to the plot of 0*a.* 3*r.* 21*p.* The plaintiff's counsel have abandoned the claim to the coal-shed surrounded with the fence; I confess that I have had some doubt about the granaries; they are occupied by tenants, and they form no part of the railway or its works, and therefore at first sight it does not seem

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that they are wanted for the purposes of the undertaking; but on the other hand it must not be forgotten that the granaries are used for storing corn sent by the railway, and the consequence of holding that these granaries have vested in the plaintiff would be, that the company would build some additional sheds, at which the corn could be unloaded from the trucks upon the railway into the carts of the present tenants and so conveyed to whatever granaries the latter might occupy. The tenants who occupy the granaries are enabled to avoid unnecessary labour, and I think it may fairly be said that the granaries are required for the purposes of the undertaking. A similar argument applies to the other coal-shed occupied by Quadling. The plaintiff's counsel admitted that he could not recover the roadway which leads out of the plot of 0*a.* 2*r.* 1*p.* past the fence round the coal-shed and thence to the line; but they did not altogether abandon the claim to the stables. Now railway companies find it necessary to use horses at their stations, and therefore they must have stables. The plaintiff claimed also the beerhouse; I imagine that if a refreshment-room is allowable at a railway station, a beerhouse also may be kept up. But it is unnecessary to decide this point, because, as I have said already, if a piece of land claimed by an adjoining owner is as a whole needed for the purposes of the railway, small portions of it, which happen to be superfluous, do not vest in him. It was suggested that, at all events, the north end of this plot of 0*a.* 3*r.* 21*p.* was superfluous; the plaintiff, however, cannot recover it, because the plot as a whole is wanted for the purposes of the railway.

I may remark that it is difficult to see how very small pieces of land lying alongside a railway can ever become superfluous: they will always be useful for the purpose of depositing soil, and it is to be observed that the company have reserved power to resume possession of the land which they have let.

The plots 0*a.* 0*r.* 14*p.* and 1*a.* 3*r.* 14*p.* may be taken together. It seems to me impossible that the judge could have directed the jury that these were superfluous, unless the evidence for the defendants upon the face of it was unworthy of credit: that evidence was that it was intended to make a new road to the station leading from the north: this evidence is in itself highly

probable, for the intended road would certainly afford much more convenient access to the station for persons coming from that direction; and I suppose that if funds had been forthcoming, the road would have been long ago constructed. It was also argued that the whole of the plot of 1*a.* 3*r.* 14*p.* could not be wanted for the purpose of making the intended road, and therefore that some portions of it must have vested in the plaintiff. I think that the defendants are entitled to say that until the road has been actually made, it is impossible to determine which part is really wanted for the purposes of the undertaking, and which is superfluous. There is no ground for imputing mala fides to the defendants, and the plaintiff cannot point out any substantial portion of the plot as a piece of land which will not be wanted for the road. Moreover there is evidence to which we must give credit that some portion of the plot will be required for sidings, and although the railway is in a cutting twenty feet below the level of the plot, we cannot say as matter of law that the plot is not wanted for sidings. Therefore the plaintiff cannot recover either the plot of 0*a.* 0*r.* 14*p.*, or the plot of 1*a.* 3*r.* 14*p.*

I now come to the small triangular piece of 0*a.* 1*r.* 3*p.* At one time during the argument I thought this piece must be awarded to the plaintiff, and that the judge ought to have directed the jury that it was superfluous land; my reason for thinking so was as follows: the site of the old road, which the defendants wrongfully diverted, still remains a road, and they might restore the old line of communication by simply building a bridge over their line; but upon further consideration I am of opinion that the plaintiff cannot succeed as to this triangular piece; if the defendants restore the old line of road they may have to raise its level, and they may have to build buttresses and approaches to the new bridge; in order to execute these works, they will require this triangular piece, and they may fairly say that it is required for the purposes of their undertaking. I have therefore come to the conclusion that the judge could not have directed the jury that, in point of law, this triangular piece was superfluous land, and I cannot say that either the verdict, or the decision of the Court of Exchequer, was wrong.

I therefore think that this judgment must be affirmed.

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BRETT, L.J. I am of opinion that the judgment of the Court of Exchequer was right, for the reasons given in that Court; it therefore seems to me unnecessary to determine the question which has been raised as to the construction of the Judicature Acts; I do not now venture at all to question what has fallen from Lord Justice Bramwell; and I may say that if this case is to be decided upon the same grounds as it was decided in the Court of Exchequer, much more may be urged upon the plaintiff's behalf than could be advanced if this were treated as a hearing before the Court of Exchequer Chamber, where the right of appeal was more restricted than it is to this Court. I decline therefore to give any opinion on the construction of the Judicature Acts.

The question, which we have to determine, seems to me to depend upon the principle, which in *Hooper* v. *Bourne* (1) we considered to be the result of *Great Western Ry. Co.* v. *May*. (2) It follows that we must consider whether upon the last day of the ten years if all the facts had been known it could have been foreseen that, owing to the ordinary development of the railway or neighbourhood, the land would within a reasonable time be required for the purposes of the undertaking. When this case was before the Court of Exchequer, it was considered that an agreement had been come to at the trial that with the assistance of the findings by the jury "the Court should determine whether, upon the facts proved, the lands must be deemed in point of law to have become superfluous lands." (3) Now the jury have found certain facts which go far to decide the whole case; they have found that "the whole of the lands in question were taken solely for the purposes of the Act; that they were and are duly fenced off from the adjoining lands; and that they have ever since been and are still retained bonâ fide for the purposes of the Act." The only matter, therefore, which remains to be determined is, whether it could have been reasonably foreseen in 1861, when the period of ten years expired, that the lands would be required for the purposes of the railway; they were obviously wanted by the company for the purposes of the undertaking at the time of the trial. I will now

(1) 3 Q. B. D. 258, at pp. 274, 282, 287.

(2) Law Rep. 7 H. L. 283.

(3) Per Kelly, C.B., Law Rep. 8 Ex. 294, at p. 299.

refer to the judgment of the Lord Chief Baron (1): he there points out that the plots of land sought to be recovered are in close proximity to the railway and station; and it seems to me that a court or a jury ought to hesitate to call land superfluous which immediately adjoins a station, and therefore must be wanted for any ordinary development of the traffic at that station. The Lord Chief Baron also notices the small size of these plots of land, and this is a most material consideration; for if there were any development at this station, the whole of them would probably be required to meet that development. The Court of Exchequer had before them the findings of the jury and the evidence given at the trial, and if I thought the question doubtful, I should not be prepared to overrule the judgment of the Court of Exchequer; for a Court of Appeal ought not to set aside the decision of the Court below upon what is substantially a question of fact, unless the decision is clearly wrong; but I do not think that the judgment of the Court of Exchequer was clearly wrong, and, on the contrary, it seems to me to have been right as to all these plots of land.

It was urged on behalf of the plaintiff that the granaries could not be required for the purposes of the railway, because they were occupied by tenants to the railway company. I will assume that the company have gone beyond their powers in letting the granaries, but that does not seem to me to decide the matter; there is evidence that the granaries are wanted for storing corn, and there is the very important circumstance that the railway company have reserved to themselves the right of taking possession of them at a future time; and in my opinion it makes no difference that they were willing to pay compensation upon resuming possession. That seems to me to be strong evidence to shew, that in the opinion of competent persons the land might be required for the purposes of the railway within a reasonable time. As to the remainder of the plots, in my opinion the evidence was strong to shew, that it might within a short time be wanted for the extension of the station and for the formation of a road to give more convenient access to persons coming to the station from the north. With

(1) Law Rep. 8 Ex. 294, at p. 300.

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regard to the triangular piece, in my opinion the railway company might very reasonably say that they did want it on account of the doubt, which they felt as to what they might be called upon to do with respect to the diverted road; it is not material what was the strict law applicable to the case: there was sufficient doubt about the case to make it reasonable that the railway company should reserve the whole of the triangular piece.

I think that the decision of the Court of Exchequer was right and ought not to be overruled.

COTTON, L.J. Owing to the view which I take of the facts, it is unnecessary for me to express any opinion as to the construction of the Judicature Acts; and it must not be assumed that I decide against the objection raised on behalf of the company, namely, that this appeal having been begun before the Judicature Acts, and having been intended to be argued before the Exchequer Chamber, and the special case having been stated pursuant to the Common Law Procedure Act, 1854, we cannot deal with the appeal otherwise than that Court could have dealt with it. I will however consider the appeal as brought under the Judicature Acts, for that is the most favourable view for the plaintiff.

The conclusion at which we arrived in *Hooper* v. *Bourne* (1) was entirely consistent with the decision in *Great Western Ry. Co.* v. *May*. (2) The principle laid down by the House of Lords in that case was of course binding upon us, and we intended to follow it. When Lord Cairns spoke of a survey being made at the end of the ten years (3), for the purpose of determining what land at that moment was superfluous, he did not mean that the officers of the railway were then to make a survey, and to decide whether the land was required for the purposes of the undertaking; for it is obvious that their decision would in no way be binding; what in my opinion Lord Cairns meant, was that the expiration of the ten years is the period to which the tribunal is to look, when it has to decide whether the land in dispute is superfluous; and the tribunal may take notice of facts which have since become known for the purpose of deciding, whether it could then have been foreseen, that

(1) 3 Q. B. D. 258. (2) Law Rep. 7 H. L. 283. (3) Page 294.

according to the ordinary development of the railway and the neighbourhood, the land would be required for the purposes of the railway within a reasonable time after the expiration of that period.

I will proceed to consider, whether the judge ought to have directed the jury that any portion of the land sought to be recovered was superfluous, and whether the findings of the jury were or were not supported by the evidence. No doubt it is a circumstance worthy of remark that a long time has elapsed since the passing of the Acts authorizing the construction of the railway, and that nevertheless some portions at least of the land have not been applied to the purposes of the undertaking. But that is explained by the circumstance, that the company have not had the funds necessary to enable them to make adequate provision for the development of the railway, and on the other hand there is very satisfactory evidence to shew that the traffic at Diss station has been largely increasing, and for years past additional accommodation has been needed. Starting from these facts I will proceed to consider whether the land sought to be recovered could, in 1861, be said to be required for the purposes of the undertaking. It is to be remarked that all the land, with the exception of the plot of 1*a.* 3*r.* 14*p.*, and of the triangular piece, lies in a narrow strip alongside the railway in the immediate neighbourhood of the station, and therefore it is land which would be wanted by the company if there should be any development of traffic at the station. I need not say anything as to this matter, except that I quite agree with what has fallen from Lord Justice Bramwell, namely, that when the question arises, whether a piece of land is superfluous, it is immaterial to consider whether a small portion of it is or is not required; the piece of land must be considered as a whole, and the judgment of the Court must depend upon this, whether or not the piece of land as a whole is required for the purposes of the undertaking. I think it would be unreasonable that a railway company, after the expiration of their compulsory powers, should be compelled to part with a portion of the piece of land, which, regarded as a whole, is useful to them for their undertaking.

The counsel for the plaintiff admitted that he could not recover the plot of 0*a.* 2*r.* 1*p.*, and they abandoned the claim also to so much

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of the plot of 0*a.* 3*r.* 21*p.* as formed the site of the coal-shed surrounded by the fence, and the site of the roadway for the cattle; it seems to me that the abandonment of the claim to a portion of 0*a.* 3*r.* 21*p.* goes a long way towards deciding the question as to the residue, because the plot must be considered as a whole; it lies immediately behind the station, and thus raises a strong presumption that it is wanted for the purposes of the railway. As regards the stables, it appears that up to about 1861 the company themselves delivered goods coming by their railway; they then kept many horses; after they had discontinued to do so, they kept only two or three and let off a portion of the stables; but I cannot think upon these facts that the site of the stables became superfluous land. As to the granaries and coal-sheds, in my opinion, they did not vest in the plaintiff; under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16, a railway company may erect warehouses and such "other works and conveniences as they think proper." I think that the company might lawfully construct such buildings as these, which are used not as shops or manufactories, but simply for depositing coal and grain brought along the railway, until it is convenient for the customers of the company to send them away; it would have been different if the company had let the buildings as an iron-foundry, even although the ore to be smelted were brought along the line; there is nothing to prevent a railway company from allowing any person, who brings goods along their line, from leaving them at a station as long as he pleases. I think that these considerations dispose of the question as to the coal-sheds and granaries. The question as to the beerhouse may seem a little more doubtful; but in any point of view the plaintiff cannot recover the site of it if a substantial portion of it is used for railway purposes; if the directors have wrongfully erected a beerhouse, and have thereby wasted the money of the shareholders, the remedy is not by enabling an adjoining owner to take possession of the site, but by taking proceedings against the directors for misapplying the funds of the company. I think, however, that the beerhouse may be considered as equivalent to a refreshment-room for third-class passengers. As regards the plot of 0*a.* 0*r.* 14*p.* and the plot of 1*a.* 3*r.* 14*p.* we cannot overlook the fact that they were wanted to make a

road and also sidings, and that the company did really intend to use them for that purpose. As regards the small triangular piece of land, I agree with Lord Justice Bramwell, for the reasons given by him, that we are not bound to overrule the judgment of the Court of Exchequer, and to hold that it vested in the plaintiff in the year 1861.

Judgment affirmed.

Solicitors for plaintiff: *Hayes, Twisden, Parker, & Co., for T. W. Salmon, Diss.*

Solicitor for defendants: *C. A. Curwood.*

BLAKE *v.* APPLEYARD.

May 1.

Practice—Costs—Counter-claim—County Court Act, 1867, s. 5—*Rules of Court*, 1875, *Order XIX., Rule* 3.

The County Court Act, 1867, s. 5, does not apply to counter-claims, so that where the plaintiff proved a claim for 40*l.*, and the defendant a counter-claim for 10*l.*, the defendant, in the absence of any order as to costs, was held entitled to the costs of proving his counter-claim and of the issues, so far as they related thereto.

THIS was an appeal against an order of a judge at chambers, made on review of the taxation of costs in the action.

The plaintiff's claim was for 21*l.* for a growing crop of cabbages sold to the defendant, and 19*l.* for hire of a waggon, making together 40*l.*, and for damages for loss of use of the plaintiff's land through the defendant not removing the cabbages as soon as agreed on.

The defendant in his defence, admitted the two claims for 21*l.* and 19*l.*, but disputed the remainder of the plaintiff's claim. He also set up a counter-claim for, 1. Damages to the crop of cabbages by the plaintiff having run harriers over it. 2. Damages for the waggon not being reasonably fit. 3. Damages for misrepresentation as to the size of the crop.

At the trial at Croydon at the summer assizes, 1877, the plaintiff recovered on the admitted claim for 40*l.*, but failed on the remainder. The defendant obtained the verdict of the jury for

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10*l.* damages done by the harriers, but failed as to the remainder of his counter-claim. The learned judge before whom the cause was tried made no order as to costs.

On taxation, the plaintiff was allowed his costs of the cause generally, so far as he succeeded therein, but the master allowed the defendant his costs of proving so much of his counter-claim as he succeeded on, and his costs of the pleadings so far as they related thereto.

The plaintiff objected to the allowance to the defendant of any costs, on the ground that in the absence of any certificate or order as to costs, under Order LV., Rule 1, they followed the event, which was in the plaintiff's favour, and further, that the counter-claim having, by virtue of Order XIX., Rule 3, the effect of a statement of claim in a cross action, and the defendant having recovered a sum not exceeding 10*l.* in respect thereof, was not entitled to any costs of suit by virtue of the County Courts Act, 1867, s. 5, preserved by the 67th sect. of the Judicature Act, 1873.

On appeal to Field, J., at chambers, the master was directed to review his taxation so far as regards the costs of the counter-claim, and against this order the defendant appealed.

H. T. Cole, Q.C., and *Francis*, for the defendant. The objection that the County Court Act, 1867, applies, cannot be sustained, for the defendant has not recovered a judgment, but he has succeeded in diminishing the plaintiff's claim, and is entitled to his costs of doing so.

H. Matthews, Q.C. (*Spearman* with him). The event here has been in favour of the plaintiff, who is, therefore, entitled to his costs under Order LV., Rule 1, at all events by Order XIX., Rule 3, the defendant is placed in the position of having recovered in a cross action, and having recovered only 10*l.* he is entitled to no costs.

KELLY, C.B. My Brother Field seems to have treated this counter-claim as if it were an action brought by the defendant in the superior Court, but this it is not. The defendant has raised this counter-claim, and by Order XIX., Rule 3, it is to have the

same effect as a statement of claim in a cross action, but that provision is governed by the succeeding words, "so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim." Then it is said, by Order LV., Rule 1, costs are to follow the event, unless the judge otherwise orders. That is no doubt the case, and the plaintiff having recovered, obtains the general costs; but there is nothing to prevent the defendant from obtaining the costs of those matters on which he succeeds. I think, therefore, the appeal must be allowed.

POLLOCK, B. I entirely agree. The County Court Act did not contemplate counter-claims, but it contemplated the selection of a tribunal by the plaintiff, who has the choice where he will go to try his claim. When we look at Order XIX., Rule 3, the words "so as to enable the Court to pronounce a final judgment," shew that the rule points to the mode of procedure in the court, and is not intended to make the counter-claim stand in every respect on the same footing as a claim in a cross action. *Staples* v. *Young* (1) supports this view. This Court there held that where plaintiff and defendant each succeed to some extent, the plaintiff recovers the balance of his claim over that which the defendant proves. The Court negatived the argument that there were two judgments, one in favour of the plaintiff and the other of the defendant. I think, therefore, that the County Court Act, does not apply to this case, and that the taxation of the master was correct.

Order reversed.

Solicitors for plaintiff: *Blake & Snow.*
Solicitors for defendant: *Pickett & Mytton.*

(1) 2 Ex. D. 324.

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Feb. 27.

[IN THE COURT OF APPEAL.]

CLOW *v.* HARPER.

Practice—Compulsory Reference—Common Law Procedure Act, 1854, *s.* 3.

In an action for breach of covenant to repair the defendant denied his liability. A judge having ordered the action to be referred compulsorily under the Common Law Procedure Act, 1854, s. 3, the Exchequer Division affirmed the order:—

Held, that the order must be reversed, for the judge had wrongly exercised his discretion in referring it.

Semble (by Cockburn, C.J., Brett and Cotton, L.JJ.), that as there was a preliminary question as to the liability of the defendant to be decided before any question of account could arise, there was no power to refer the action compulsorily under the above enactment.

ACTION against the defendant as assignee of lessee for breaches of covenant. First, for not having, once in every third year, painted in good oil colours all the outside wood and ironwork of the premises; secondly, for not having once in every seventh year painted and papered the inside of the premises; thirdly, for not having surrendered and yielded up to the plaintiff the messuage and premises in good and substantial repair and condition.

The defendant, by his statement of defence, denied the breaches of covenant. Issue thereon.

The plaintiff's schedule of dilapidations contained thirty-eight items, pointing out in detail the repairs required in the several rooms and parts of the house.

On the 1st of February a summons, issued at the instance of the plaintiff, calling upon the defendant to shew cause why the action should not be compulsorily referred, was heard and dismissed by the master. On appeal to a judge at chambers he made an order that the cause be referred to the certificate of one of the masters of the Exchequer Division under 17 & 18 Vict. c. 125, s. 3. On appeal to the Exchequer Division the Court affirmed the judge's order.

The defendant appealed.

C. Russell, Q.C., and *R. V. Williams*, for the defendant. The question in dispute is not mere matter of account that can be

referred under s. 3 of the Common Law Procedure Act, 1854. (1) The defendant denies his liability to repair; he insists that the premises are in a substantial state of repair, and that there has been no breach of covenant; the defendant has a right to take the opinion of the jury as to the state of the premises when he gave up possession. In making the order for a compulsory reference it has been assumed against the defendant that there is a cause of action. Until the question of liability has been established, there may or may not be mere matter of account. If a liability against the defendant is not established, it would be unnecessary to go into any account. The order, at all events, is premature. Whether there shall be a compulsory reference under s. 3 is a question for the discretion of the Court, and in its discretion in the present case the Court will not refer this action and deprive the defendant of his right to a trial by jury.

Sills, for the plaintiff. The question turns upon s. 3 of the Common Law Procedure Act, 1854. The decisions have established, and the practice has been in conformity with the decisions, that under this section the Court or a judge may order, if they think fit, the whole matter in dispute to be referred compulsorily. A judicial interpretation was put on this section in *Browne* v. *Emerson* (2) decided in 1856, and which has been acted on ever since. It was there laid down that the true construction of the enactment was that where "the matter in dispute consists, either wholly or in part, of matters of mere account, the compulsory reference may be, either of the whole matter in dispute, or of part only of the matter in dispute, as the Court or judge may think fit." Both the judge at chambers and the Exchequer Division have, in their discretion, held that the action ought to be referred, and with the exercise of that discretion this Court will not

(1) By s. 3, "If it be made to appear at any time after the issuing of the writ to the satisfaction of the Court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court."

(2) 17 C. B. 361; 25 L. J. (C.P.) 104.

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interfere. This construction has been acted upon in numerous cases. In *Insull* v. *Moojen* (1) it was decided that the master in a compulsory reference could not refuse to inquire into a question of fraud, and the recent case of *Birmingham and Staffordshire Gas Co.* v. *Ratcliff* (2) is a decision to the same effect. In *Cummins* v. *Birckett* (3) an action for dilapidations was referred; it is true money was paid into Court in that action, but still in such a case the liability is disputed beyond the sum paid into Court. In *Angell* v. *Felgate* (4) the action was for damages for not delivering up to the plaintiff at the expiration of the term demised premises in the same state and condition as they were at the commencement of the term, and for a breach of a covenant in a lease to deliver up in good repair. The defendant paid 10*l.* into court, and the plaintiff claimed damages ultra; although the case involved questions of disputed fact, the Court referred it compulsorily to arbitration.

The present order was therefore rightly made. The particulars of the breaches contain thirty-eight items of account, and the inquiry will be of so minute and detailed a character as to render a trial by jury most inconvenient.

R. V. Williams was not heard in reply.

COCKBURN, C.J. In this case the order of the Exchequer Division must be reversed. We are told that a practice has grown up that where some part of the matter in dispute in an action is matter of account, the whole action is referred, and that the order in question is consistent with such practice; and this may be so. Nevertheless, if on a review of the statutory provisions we come to the conclusion that there was no power to make the order, sitting here in the Court of Appeal we are at liberty to disregard such practice and to annul the order. We must see what is the true construction of s. 3 of the Common Law Procedure Act, 1854. The intention of the legislature was that disputes involving mere matter of account should not be brought into an expensive form of litigation and decided by a trial by jury, but should be disposed of by

(1) 3 C. B. (N.S.) 359; 27 L. J. (C.P.) 75.

(2) Law Rep. 6 Ex. 224.

(3) 27 L. J. (Ex.) 216.

(4) 7 H. & N. 396; 31 L. J. (Ex.) 41.

referring them to an arbitrator to be selected by the parties, or to an officer of the court. The language of s. 3 is, "if it be made to appear that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for the court or judge to order that such matter, either wholly or in part, be referred." The first part of these words corresponds exactly with the latter part. I think this shews that the legislature meant that where the matter in dispute involved mere matter of account, it should be competent to send the whole matter of account, or that part of the dispute which involves matter of account, to an arbitrator; but that, if some other matter, not being matter of account, is in dispute, such other matter should not be made the subject of the order, but the order should be confined to that part alone which is matter of account. First, it should be ascertained what is the matter in dispute. If part of it only is matter of mere account, that part should be directed to be disposed of by arbitration; but that part alone: otherwise we should take away the right of either party to have issues not involving mere matter of account tried in the ordinary way. Every man has a right to a trial by jury, unless it is taken away by some statutory power, and I do not think that in the present case the right is taken away. For, here there is a preliminary question how far the defendant was bound by the covenants in the lease to repair the demised premises; as also how far the premises were out of repair: if these questions are decided in favour of the defendant, there will not be any matter of account, and in any point of view the question of account is only secondary and subordinate. In my view the Exchequer Division had no power to take away trial by jury in the substantial matter, merely because there was incidentally matter of account. Its power was limited to directing a reference as to the matter of account alone.

I must also say that I think that, as matter of discretion, the order ought not to have been made. Whether we give the larger or narrower construction to s. 3—and I think the last is the correct construction—this judgment should be reversed.

BRAMWELL, L.J. I do not like to say that the practice which

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has so long prevailed is wrong, and I have some hesitation in saying that there is no jurisdiction to make this order, but I certainly think that the present order ought not to have been made. Whether or no the covenants have been broken is a question which ought to be tried by a jury, and I do not see why this part of this case should not be tried by them.

BRETT, L.J. I am of the same opinion. I think that an order for a compulsory reference in this case could not be made. I do not think that this case falls within s. 3 of the Common Law Procedure Act, 1854. If I were obliged to construe that section on the present occasion, I think the right construction to put upon the section is, if part of the matter in dispute is mere matter of account, and part is not, that then the order ought to be made to refer that which is matter of account, but not the other part. But a practice has grown up to order, in such a case, the whole action to be compulsorily referred.

It is not necessary to decide whether such an order can or cannot be made. But I am clear that in the present case no such order ought to have been made: here there is no part of the action which is mere matter of account: the defendant denies his liability for every item. There is a compound question of liability and account, and there is no matter which is mere matter of account. There may be a matter of account if the defendant is liable, but when he denies his liability it is not then a question of mere account. The short way to put this case is, that after the decision of the liability upon the covenants there may be a matter of account, but at present no part of the plaintiff's claim is mere matter of account.

COTTON, L.J. I agree with the Lord Chief Justice and Lord Justice Brett on the construction that they have put on s. 3 of the Common Law Procedure Act, 1854. All the cases which have been cited before us are cases of admitted liability—in most of them money had been paid into court. But in the present case the liability is denied in toto; it is alleged on the part of the defendant that no covenant has been broken; and until a liability is established, no question will arise as to the quantum of damages which is to be

paid for dilapidations. In a technical point of view there can be no question as to the amount which the defendant ought to pay until the question of liability is decided; there is therefore no matter of mere account.

Appeal allowed.

Solicitors for plaintiff: *Dod & Longstaffe.*
Solicitor for defendant: *Ernest Board.*

[IN THE COURT OF APPEAL.]

March 27.

MARSDEN *v.* THE SAVILLE STREET FOUNDRY AND ENGINEERING COMPANY, LIMITED.

Patent—First and True Inventor—Invention communicated in England by one British subject to another.

The communication, made in England by one British subject to another, of an invention does not make the person to whom the communication is made the first and true inventor, within the meaning of the statute 21 Jac. 1, c. 3, so as to enable him to take out letters patent for the invention.

The legal personal representative of a person who has made an invention, but not taken out letters patent for it, cannot take out such letters patent.

THIS was an action to restrain the infringement of a patent granted to the plaintiff Sarah Marsden.

The first paragraph of the statement of claim was as follows:—

"Before and at the time of the granting of the letters patent hereinafter mentioned, the plaintiff Sarah Marsden, of Leeds, was in possession of an invention for a certain new manufacture, that is to say, for [description] which had been communicated to her by her late husband, H. R. Marsden, of Leeds, aforesaid, and the same was not in use by any other person or persons, but was a new invention as to the public use and exercise thereof within the United Kingdom of Great Britain and Ireland, the Channel Islands and the Isle of Man, and was first introduced therein by the said plaintiff, Sarah Marsden."

The defendant demurred to the statement of claim as bad in law, on the ground that, on the facts as set forth in the 1st paragraph of the statement of claim, the supposed invention not having been communicated to the plaintiff by a foreigner residing abroad,

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the plaintiff was not, within the meaning of the statutes, the first and true inventor, and that the letters patent were therefore invalid.

Feb. 15. The demurrer was allowed by Pollock, B.

The plaintiff appealed.

It was stated at the bar that the plaintiff was the legal personal representative of her husband, and had found the invention among his papers.

Aston, Q.C., and *R. S. Wright*, for the plaintiff. A person who is the lawful recipient of an invention from a person in this country is a "true inventor" within the meaning of the patent law.

[JESSEL, M.R.:—Is there any authority for that? The cases holding that a communication from abroad would enable a person to take out a patent were an extension of the law, and originated at a time when communication with foreign parts was so difficult that there was merit in obtaining an invention from abroad.]

The lawful disclosure of an invention is what constitutes the merit as regards the public: Webster Pat. Ca. I. 719; *Edgebury* v. *Stephens*. (1) The case of the *Clothworkers of Ipswich* (2) shews that "inventor" cannot be understood in its popular sense. The cases can only be explained by referring them to the principle that what is to be looked to is the benefit which the public derives from an invention being made known, and that the person who has lawful exclusive possession of it and makes it known is to be considered the inventor. Patents take effect from the Royal Prerogative, which is merely restricted by the statutes as regards the duration of the monopoly, and such patents as this would clearly have been good before the Acts.

Herschell, Q.C., and *Macrory*, contrà, were not called upon.

JESSEL, M.R. This is a mere experiment. From the time of the passing of the Statute 21, Jac. 1, c. 3, down to the present time, no one, so far as I know, has contended in a court of law, much less has any court of law allowed, the validity of such a con-

(1) Ibid. 35. (2) 1 Roll. 4, Godb. 252.

tention as that a communication made in England by one British subject to another British subject can be patented by the receiver of the communication, so as to make the receiver the true and first inventor within the meaning of the patent laws.

It has been argued that before the statute of James, such patents were valid and were allowed by the judges, and that the statute merely restricts the duration of the patent, and does not destroy the right as it previously existed. Even supposing that were so, the statute defines who are considered to be worthy recipients of the grant of such a monopoly, as it was then called, and the definition so given has been followed ever since. It is difficult to say à priori on what principle a person who did not invent anything, but who merely imported from abroad into this realm the invention of another, was treated by the judges as being the first and true inventor. I have never been able to discover the principle, and although I have often made inquiry of others, and of some who are more familiar with the patent law than even I am, although I cannot pretend not to possess a considerable familiarity with it, I could never get a satisfactory answer. The only answer was, It has been so decided, and you are bound by the decisions. But it is an anomaly as far as I know, not depending on any principle whatever. It has never been declared by any judge or authority that there is such a principle, and, not being able to find one, all I can say is, that I must look upon it as a sort of anomalous decision which has acquired by time and recognition the force of law.

The grounds upon which it is put we do know. In the *Clothworkers of Ipswich Case* (1) we have this said about it: "The king granted unto B. that none besides himself should make ordnances for battery in the time of war: such grant was adjudged void. But if a man hath brought in a new invention and a new trade within the kingdom in peril of his life and consumption of his estate or stock, &c., or if a man hath made a new discovery of anything, in such cases the king of his grace and favour in recompense of his costs and travail may grant by charter unto him that he only shall use such a trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have

(1) Godb. pp. 252, 254.

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not the knowledge or skill to use it. But when that patent is expired the king cannot make a new grant thereof." Therefore the decision goes no further than this—that at that time, considering the difficulty which then attended communication from abroad, a man who brought in anything from abroad did it at the peril of his life (for travelling was not without danger in the time of Henry VIII.) and consumption of his estate and stock, and it was therefore such a meritorious service done to this kingdom, that the king might lawfully grant him a monopoly. That is the ground it is put upon. Now, there is some reason in that. It does not make him the true and first inventor, but it does shew a meritorious consideration which warranted an exception from the general rule that monopolies could not be granted. How that applies to a gentleman in Leeds whispering in his neighbour's ear in a street in Leeds, I do not know. At all events it does not appear to me that such a case as this is within the grounds I have mentioned.

Another case referred to by patent lawyers as declaring the law upon this subject, although it is only a statement in argument of the old decided cases, is the case of *Darcy* v. *Allin* (1). The passage I am going to read is at p. 182. It is a statement by counsel in argument of what the decisions were, and is equivalent to a report therefore of what those decisions were. "Now therefore I will shew you how the judges have heretofore allowed of monopoly patents, which is that where any man by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm; that in such cases the king may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth, otherwise not." He is to bring it into the realm. Then he cites his authorities: "In the 9th Eliz. there was a patent granted to Mr. Hastings of the Court—that in consideration that he brought in the skill of making of frisadoes as they were made in Harlem and Amsterdam beyond the seas, being not used in England, that therefore he

(1) Noy, 173.

should have the sole trade of the making and selling thereof for divers years, charging all other subjects not to make any frisadoes in England during that time upon pain to forfeit the same frisadoes by them made, and to forfeit also 100*l.*, the one moiety thereof to the Queen's Majestie, the other to Mr. Hastings. Upon which patent Mr. Hastings, about twenty years past, exhibited an information in the Exchequer against certain clothiers of Coxfall for making of frisadoes contrary to the intent of this patent." Then the defence was that they used to make them before the patent and that was allowed. "Another monopoly patent was granted to Mr. Matthey, a cutler at Fleet Bridge, in the beginning of this queen's time, which I have here in Court to shew, by which patent it was granted unto him the sole making of knives with bone hafts and plates of lattin, because, as the patent suggested, he brought the first use thereof from beyond seas." That was the form of the patent. Then he gives a third patent which has no bearing on this case because it was a patent granted to a man for an invention within the realm. That was "a monopoly patent granted to one Humphrey of the Tower for the sole and only use of a sieve or instrument for melting of lead, supposing that it was of his own invention and therefore prohibited all others to use the same for a time." Now of the three examples, two of them had been brought beyond the seas and the third was the man's own invention. He gives them as examples of his own proposition that those are the only two cases in which the Crown had the right to grant a monopoly. No doubt it was that user which induced the judges, after the passing of the statute of James, to treat the man who brought the invention from beyond the seas as being in the same position as the first and true inventor, or as being in an equivalent position, and gradually the language seems to have been changed and he was treated as the true and first inventor.

Now that is the origin of the decisions, and that being the origin of them, what possible right have we to say that we can now extend that privilege, beyond the importation of an invention from beyond the seas, to the case of a man (I am dealing with the real case as told us and not the case as appears by the statement of claim) who dies before taking out a patent, and whose legal personal representative, finding the invention sufficiently described

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amongst his papers, thereupon obtains a patent as upon a communication from him. Whether or not there should be legislative provision for such a case it is not for us to say. But there is none. He is neither the first nor the true inventor within the ordinary or existing legal meaning of the term.

It appears to me therefore that the patent is bad and that the demurrer was properly allowed.

COTTON, L.J. I agree. It may be a hardship that there is no possibility under such circumstances for Sarah Marsden to obtain a good patent, but that is for the legislature, not for us to consider. The only exception from the necessity of there being an invention by the person who takes out a patent is the case of a communication made from abroad. That probably went on the principle mentioned by the Master of the Rolls, and acted upon in the old cases, of treating the person who introduced from abroad a new trade or invention as in the same position as the true and first inventor. I cannot see that by any means we can extend the exception to such a case as the present, where the lady finds something among her husband's papers which was an invention not patented by him, but which might have been the subject of a good patent, if he had applied for it.

THESIGER, L.J. I am of the same opinion.

Judgment affirmed.

Solicitor for plaintiff: *J. H. Johnson.*
Solicitor for defendants: *G. Lucas.*

ROOK, APPELLANT; HOPLEY, RESPONDENT. 1878

May 18.

Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25—*Nature, Substance, and Quality of Article demanded—Exemption of Defendant—Written Warranty.*

On a prosecution under the Sale of Food and Drugs Act, 1875, for selling as lard a substance which was lard adulterated with upwards of 15 per cent. of water, the defendant proved that he sold the substance in the same condition as it was in when he bought it, and that when he purchased it he received an invoice in which it was described as lard:—

Held, that the invoice was not a written warranty within the 25th section, so as to discharge the defendant.

CASE stated by the stipendiary magistrate of Manchester under 20 & 21 Vict. c. 43.

At a petty session holden at the City Police Court in Manchester, Andrew Thomas Rook (inspector of nuisances of the city of Manchester and an officer appointed by and acting for the council of the city under the sale of Food and Drugs Act, 1875), hereinafter called the appellant, appeared by his solicitor in support of a summons issued on an information preferred by him against John Hopley, hereinafter called the respondent, charging that the respondent did, on the 3rd of July, 1876, within the city aforesaid, sell to the prejudice of the appellant, the purchaser thereof, a certain article of food, to wit, lard, which was not of the nature, substance, and quality of the article demanded by him, contrary to the form of the statute in that case made and provided. The information having been heard at the petty sessions and dismissed, the appellant applied for a case which was stated as follows:

By s. 6 of 38 & 39 Vict. c. 63 (Sale of Food and Drugs Act, 1875), it is enacted that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l.*"

By s. 25 it is enacted that "if the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had

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no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution."

The appellant, on the 3rd of July, 1876, during the daytime entered the shop of the respondent, and there found the shopman of the respondent standing behind the counter, upon which were a substance appearing to be lard, and other commodities. The appellant said to the shopman, "I want a pound of lard." The shopman thereupon handed to the appellant a pound of the said substance, saying at the same time that the price was 8*d.*, which the appellant then paid.

The substance was handed to the public analyst, who certified that it was a sample of adulterated lard, and contained the percentages of foreign ingredients as under; namely, upwards of 15 per cent. of water.

The magistrate found as a fact that the lard was adulterated with water to the extent described in the certificate of the public analyst.

All matters and things appointed by the sale of Food and Drugs Act, 1875, to be done and performed by any person purchasing any article with the intention of submitting the same to analysis, were duly done and performed by the appellant in respect of the lard and the purchase made by him as aforesaid.

The respondent proved that he had purchased of William Walker, a wholesale cheese factor and provision merchant in Liverpool, amongst other goods, four tins of lard, and at the time of the purchase received a document of which the following is a copy:—

"20th June, 1876.

"Bought by Mr. J. Hopley, Manchester, of William Walker, cheese factor and provision merchant.

"4 Tins lard, 'No. 1.'

28 lbs. each, 1^{c}„ 0 „ 0 K @ 55*s.* . £2 15 0."

The respondent also proved that the substance purchased by the appellant as aforesaid was a portion of the substance contained in the four tins mentioned in the document, and was sold by the respondent to the appellant in the same condition as it was purchased and received by the respondent from Walker.

The respondent proved to the magistrate's satisfaction that when he purchased the article in question from Walker, what he asked to be supplied with was lard, and that the respondent had no reason to believe when he sold the adulterated substance to the appellant that it was otherwise than pure lard, and that he sold it in the same state as when he purchased it.

No evidence was offered by either party to explain the meaning of the word and figure "No. 1," as used in the document, or that there is any article known in the trade as lard "No. 1." No suggestion was made by the appellant or by the respondent that the word and figure "No. 1," or anything else in the document, imported any addition or qualification to the word "lard."

It was contended on the part of the respondent that the document was a sufficient written warranty within the 25th section of the Act, and that he ought accordingly to be discharged from the prosecution.

The magistrate decided the question in favour of the respondent, and discharged him from the prosecution.

The Court was to reverse or affirm the determination or remit the case with the opinion of the Court thereon, or make such other order in relation to the same as the Court might see fit.

J. Brown, Q.C. (*Dutton* with him), for the appellant. The invoice is not a warranty, but a description: *Josling* v. *Kingsford* (1); *Nichol* v. *Godts* (2); and certainly it is not the express written warranty required by the statute.

Ambrose, Q.C., for the respondent. The prosecution have not proved that the article asked for by the appellant was not supplied to him. They have not shewn that lard with 15 per cent. of water is not of the nature, substance, and quality of lard, and it is quite possible the respondent may come within the exception, which the prosecution ought to have negatived. Further, the invoice is a warranty. The object of the Act is to prevent collusion, by having written evidence that the person accused purchased the goods in the same condition as that in which he sold them, and that would be attained if this were held to be a warranty. [He referred to

(1) 13 C. B. (N.S.) 447; 32 L. J. (C.P.) 94.
(2) 10 Ex. 191; 23 L. J. (Ex.) 314.

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Gardiner v. *Gray* (1); *Allan* v. *Lake* (2); *Jones* v. *Just* (3); *Bowes* v. *Shand* (4); *Randall* v. *Newson* (5).]

J. Brown, Q.C., was not called on to reply.

KELLY, C.B. I am of opinion that the appellant is entitled to the judgment of the Court. I regret to have to come to that decision, because it is impossible not to see that this is a hard case, but with that we have nothing to do here. The facts of the case are very simple. The appellant purchased this article, which he caused to be subjected to analysis. It turned out to be (though in one sense it may be called lard) of the quality and nature described by the analyst as "adulterated lard," containing 15 per cent. of the foreign ingredient water. The main defence is that the respondent is protected under the 25th section, because he sold the article just as he received it, having himself bought it with an invoice which it is contended amounts to a written warranty within the statute. A number of authorities were referred to on the question whether a description in an invoice amounts to a warranty, but I do not propose to go into those cases. Nor do I say what my decision on those cases would be if they came before me in a court of appeal. The decision in *Josling* v. *Kingsford* (6) is applicable to this case, and in view of that decision I cannot hold that this invoice contains anything more than a description, which cannot be deemed to be a warranty. But then it is further argued for the respondent that the article sold to the appellant was that which he demanded. In one sense it might be called "lard," but looking at the analysis, the finding of the magistrate, and the other facts in the case, I am unable to say that the appellant was supplied with the article for which he asked. I think the decision of the magistrate was wrong, and the case must be remitted with our opinion.

POLLOCK, B. I also think that the appellant is entitled to judgment, and I base my decision entirely on the construction of this Act itself. It is a case of great importance, because in all the

(1) 4 Camp. 144.
(2) 18 Q. B. 560.
(3) Law Rep. 3 Q. B. 197.
(4) Law Rep. 2 App. Cas. 455.
(5) 2 Q. B. D. 102.
(6) 13 C. B. (N.S.) 447; 32 L. J. (C.P.) 94.

earlier statutes it was required that the person who prosecuted should shew that the person selling the article either adulterated it himself or knew that it was adulterated when he sold it. This state of things has been altered, and now new and more stringent provisions are introduced to protect from adulteration, and it is requisite that we should be careful in putting a construction upon them. Now s. 6, under which it is said the respondent comes, provides that the sale must be to the prejudice of the purchaser. This is not expressly found in the case, but the magistrate has set out the finding of the analyst, and I think it sufficiently appears that the sale was to the prejudice of the purchaser. There are several exceptions in the section, all of which it was open to the respondent to raise before the magistrate and to have dealt with there; moreover the statute hedges the vendor round with protections. If any of those exceptions exist, the person charged has abundant opportunity of proving them. To come to the facts of this case, the article demanded was lard. The public analyst has found that the article sold was adulterated lard in which there was upwards of 15 per cent. of water, an ingredient foreign to lard. There is nothing to bring the person who sold within the exceptions in s. 6, and I can come to no other conclusion than that this was an article of food which was not the article asked for, and which was sold to the prejudice of the purchaser. Turning to the question of the construction to be put on the 25th section, which protects the vendor where he has bought the article with a written warranty, I say nothing as to the decided cases, but I base my decision on the section itself, and looking to that I think there was no warranty. It is very easy in such a document to say that the goods are warranted, but no such expression occurs here. In my opinion, what is required by the statute is a writing expressing on the face of it that it is a warranty. There is nothing of that sort here, and I therefore think the respondent has failed to bring himself within the protection of the 25th section.

Case remitted.

Solicitor for appellant: *R. F. Austin for W. H. Talbot, Manchester.*

Solicitors for respondent: *Le Riche & Son, for Cobbett, Wheeler, & Cobbett, Manchester.*

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Jan. 23.

[IN THE COURT OF APPEAL.]

THE ATTORNEY GENERAL *v.* LAMPLOUGH.

Statute—Repeal of part—Effect of Repeal—Stamp Duties on Medicines—52 Geo. 3, c. 150—3 & 4 Wm. 4, c. 97, s. 20.

The statute 52 Geo. 3, c. 150, imposed a stamp duty on a number of articles specifically named in a schedule, and, among others, on "waters, videlicet, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters," and also by a general clause at the end of the schedule on "all other . . . . waters" to be used as medicines made by any person, and by public notice or advertisement held out to the public by the makers, vendors, or proprietors thereof, as beneficial to the prevention, cure, or relief of any disorder or complaint affecting the human body. The statute 3 & 4 Wm. 4, c. 97, s. 20, repealed so much of the schedule to the former Act as is contained in the words commencing "waters, videlicet."

A composition sold in a solid state contained three ingredients, one of which was a medicine, the other two, bicarbonate of soda and tartaric acid, being added to evolve carbonic acid gas when it was dissolved in water; it was advertised by the vendor as a medicine:—

Held, by the Court of Appeal, Bramwell, Brett, and Cotton, L.JJ., overruling the decision of the majority of the Exchequer Division, that the article was a "water," and was taxable as such by the schedule of 52 Geo. 3, c. 150, and that by the repeal of the schedule so far as it related to "waters" the article did not become taxable under the general clause.

This was an information at the suit of the Attorney General.

The defendant was the maker and vendor of Lamplough's Pyretic Saline, and the question raised was whether that article was liable to duty under 52 Geo. 3, c. 150, s. 1, which amends an Act 44 Geo. 3, c. 98, for granting stamp duties on medicines and on licences for vending the same.

In the schedule to 52 Geo. 3, c. 150, s. 1, are enumerated alphabetically a large number of articles to which the duty is to attach, and when the Act was passed this schedule contained the following item:—"Waters, videlicet, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters."

At the end of the list of named articles are the following general words. "And also all other pills, powders, lozenges, tinctures, potions, cordials, electuaries, plaisters, unguents, salves, ointments, drops, lotions, oils, spirits, medicated herbs and waters, chemical and officinal preparations whatsoever, to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief, of any disorder or complaint incident to or in anywise affecting the human body, made, prepared, uttered, vended, or exposed to sale by any person or persons whatsoever wherein the person making, preparing, uttering, vending, or exposing to sale the same hath, or claims to have, any occult secret or art for the making or preparing the same, or hath, or claims to have, any exclusive right or title to the making or preparing the same, or which have at any time heretofore been, now are, or shall hereafter be prepared, uttered, vended or exposed to sale under the authority of any letters patent under the great seal, or which have at any time heretofore been, now are, or shall hereafter be, by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, box, bottle, phial, or other inclosure containing the same, held out or recommended to the public by the makers, vendors, or proprietors thereof, as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint incident to or in anywise affecting the human body."

The statute 3 & 4 Wm. 4, c. 97, s. 20 (1), entitled "An Act to prevent the selling and uttering of forged stamps and to exempt from stamp duty artificial mineral water in Great Britain, &c.," after reciting the statute of 52 Geo. 3, c. 150, and that it was expedient to alter the schedule in the manner thereinafter mentioned, enacted that so much of the schedule as is contained in the words (which were set out) commencing "waters, videlicet," should be repealed.

At the trial before Cleasby, B., at the Easter Sittings, 1877, in Middlesex, the composition of Lamplough's Pyretic Saline was stated to be tartaric acid 45·7, bicarbonate of soda, 52·4, and

(1) Repealed by the Statute Law Revision Act, 1874, 37 & 38 Vict. c. 35.

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chlorate of potash 1·9, and it was shewn that the last-named ingredient was a medicine, that the soda and acid evolved carbonic acid gas on the addition of water to the pyretic saline, and that the article was advertised as a cure for a number of disorders or complaints affecting the human body. Upon proof that no stamp duty was paid a verdict was entered for the Crown, leave being reserved to set aside this verdict and enter one for the defendant.

A rule was obtained accordingly, on the ground that on the true construction of the Act, Lamplough's Pyretic Saline was not liable to duty.

June 11, 1877. *Sir H. S. Giffard, S.G.*, and *Dicey*, for the Crown. The effect of the repealing statute is to strike out the paragraph as to mineral waters from the schedule, which must be read as though that clause had never been inserted. Reading the statute as it stands without that paragraph, it is clear that this article comes within the general words in the schedule, whether it is regarded as intrinsically a medicine or only as being recommended as such. It is in fact, a medicine, being advertised as such, and one of its components, chlorate of potash, being admitted to be a medicine.

Herschell, Q.C., and *E. Brodie Cooper*, for the defendant. The effect of the contention for the Crown would be that, if the legislature had repealed the Act with regard to any one of the specific things named, such repeal would have been a nullity if the article came within the general words, for the duty would still be chargeable. This article comes within the definition in the schedule under the heading "waters," as it is used for compounding either an artificial mineral water or else water impregnated with soda or with carbonic acid gas. It therefore, at the time the Act passed, did not come within the schedule which refers to things other than those enumerated, and on the repeal of the general words applying to it it is no longer liable to duty.

Sir H. S. Giffard, S.G., in reply.

Cur. adv. vult.

June 18. HUDDLESTON, B. This was a case tried before my Brother Cleasby, when, upon the facts stated, a verdict was entered for the Crown. Mr. Herschell subsequently moved to set

aside that verdict pursuant to leave reserved, and to enter a verdict for the defendant, and the question was whether, having regard to 52 Geo. 3, c. 150, and 3 & 4 Wm. 4, c. 97, s. 20, an article called Lamplough's Pyretic Saline was liable to duty.

The argument urged by Mr. Herschell was that Lamplough's Pyretic Saline was only taxable to the government under the item "waters" in the schedule; and that, when those words were repealed, the effect would be that for the future Lamplough's Pyretic Saline might be sold without paying any duty, or without any stamp; and he urged that if Lamplough's Pyretic Saline was within those particular words, it could not be within the general words at the end of the schedule, and, therefore, when you excised the words which included it, you could not afterwards bring it within the general words, within which it might have been said to come, if the particular words had not been incorporated in the schedule. That was a very ingenious argument, but we have to consider what is the effect of the repealing statute, and I am of opinion that the effect of the repealing statute is, that those words, as they stand in the schedule to 52 Geo. 3, c. 150, are taken out of the schedule, and that after 1833 that statute was to be read in every respect as if those words were not in it. Mr. Herschell argued that supposing a statute passed in which the legislature took any specific item, Arquebusade water, for instance, out of the schedule, we ought not to hold that Arquebusade water would afterwards come within the words "all other pills, powders, waters," and so on. My answer is, if the legislature had intended to repeal the duty upon Arquebusade water, they would have said so in so many words: they would have said Arquebusade water is not to be liable to duty. If they do not choose to do that, then it must fall within the general rule I have mentioned. My view of the effect of a repealing statute is not without authority. I find, in the case of *Kay* v. *Godwin* (1), Tindal, C.J., says: "I take the effect of repealing a statute to be to obliterate it as completely from the records of parliament as if it had never existed; it must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted, and concluded while it was an existing law."

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That, I apprehend, would apply equally to words in a schedule which the legislature repeals. And there is also an authority in the case of *Surtees* v. *Ellison* (1), in which Lord Tenterden says: "It has been long established that when an Act of Parliament is repealed it must be considered, except as to transactions passed and closed, as if it had never existed." If, therefore, I look now at the effect of the present revised statute, I take it that these words "waters," and so on, are clearly out of the statute. Then it is quite obvious that Lamplough's Pyretic Saline would come within the general words of the schedule. But that is assuming that Lamplough's Pyretic Saline might have been included in the word "waters." I am by no means prepared to say that it is; on the contrary, I think that, prior to the statute of 1833, Lamplough's Pyretic Saline would not have come within those words "waters" and so on, but would have come within the general words; and if I am right in that view of the case, then clearly it would continue to be taxable. Lamplough's Pyretic Saline is a composition which consists of tartaric acid, bi-carbonate of soda, and chlorate of potash, in the following proportions: tartaric acid, 45·7; bi-carbonate of soda, 52·4; and chlorate of potash, 1·9. The chlorate of potash is a chemical salt, and it is not a constituent of natural mineral salts; it is used as a medicine for fevers, and that gives this article, as it is said, its medicinal character. It produces no part of the effervescence, which is produced by the mixture of tartaric acid and bi-carbonate of soda, evolving carbonic acid gas; but it is clearly to be looked upon in the nature of medicine, and when I see that it is advertised as efficacious in almost every species of ill that human flesh is heir to, I say it is a medicine made agreeable by the carbonic acid gas evolved by the mixture of acid and alkali; but it is nevertheless a medicine coming within the general words in the schedule, namely a nostrum or medicine recommended to the public by public notice, or advertisement, or by written or printed papers, or handbills, or by any label, or words written or printed affixed to or delivered with any packet, box, bottle, phial, and so on. Upon both these grounds I am of opinion that our judgment should be for the Crown.

(1) 9 B. & C. at p. 752.

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CLEASBY, B. I come to the same conclusion as my Brother Huddleston. The question is whether, under the Act of Parliament as it now stands, duty is chargeable upon this article? Taking the Act as it now stands and as it is now printed, with the part repealed struck out, and construing the words in the ordinary way, there is no doubt, as it appears to me, that duty is chargeable. It is argued that the effect of so dealing with the statute, and not looking to how it stood originally, would be that when a provision putting the duty on a particular article was repealed; if a specific item—for example, Ware's Asthmatic Drops—were taken out of the schedule by repeal, the duty would be revived by the general word "drops" in the schedule. It appears to me that this reasoning is faulty, because it assumes that the legislature would deal with a specific item like "Ware's Asthmatic Drops" by using the language of repeal, without doing more; whereas they might either enact that "Ware's Asthmatic Drops" should be no longer chargeable with duty, or if they used the language of repeal, they would say that nothing in the concluding part of the schedule should make it chargeable with duty. This particular item of "waters" appears to me to embrace two different things. "Waters" have been dealt with exceptionally before by the legislature, because it has been enacted by s. 4 of 52 Geo. 3, c. 150, that, as regards "waters" in the schedule sold to be drunk on the premises of victuallers, confectioners, &c., those shopkeepers need not have a licence, as they must for the other articles mentioned in the schedule, the only requirement being that the articles are to be sold with stamped bottles. It is sufficiently clear, then, that these waters to be drunk on the premises of victuallers and confectioners were regarded in the light of beverage-waters, which victuallers and confectioners would supply to be drunk on their own premises, and not, properly speaking, as medicinal waters for the cure of particular diseases. In dealing, therefore, with the words which come afterwards, that is to say, "waters impregnated with soda or mineral alkali or carbonic acid gas," and which would be such as would be sold by victuallers and confectioners to be drunk on the premises, the language of absolute repeal and striking them out of the statute altogether would be appropriate, because the word "other" would still retain

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the same meaning, and would include all correlative waters recommended as such, as distinguished from non-medicinal waters—that is to say, waters merely impregnated with soda or mineral alkali or with carbonic acid gas. Of course the argument depends on the legislature having made use of the word "repealed" in this case. The effect of a repeal of an enactment by the legislature has been pointed out in the authorities cited, which shew that generally, when the legislature repeals an enactment (and every clause is an enactment in an Act of Parliament), the effect is as completely to obliterate it from the records of parliament as if it had never passed.

There is an apparent difficulty raised, by suggesting that the result of giving this effect to the word "repealed" is really to give a different meaning to the word "other" in the general words of the schedule from that which it had before the repeal. There are two answers to this. First, I am by no means satisfied that a different meaning is in this case given to the word; but, secondly, I am satisfied that the legislature in this case have said that a different meaning is, if necessary, to be given to the word "other," when they obliterate from the Act of Parliament that general item of "waters" by terms of repeal. Seeing that the Act of Parliament is to be dealt with as it stands, I think that is the proper effect to be given to what the legislature have done, and, if so, I have no doubt whatever that our judgment ought to be for the Crown.

KELLY, C.B. I have the misfortune to differ from my learned Brethren in this case. The whole argument for the Crown appears to me to be based upon the confounding of two things essentially different. First, the confounding of an Act of Parliament with a particular clause in the Act of Parliament, and secondly, the confounding of one particular article or preparation with a class of articles or preparations. The state of the law appears to have been this down to the 29th of August, 1833. A duty was imposed on a great number of medicines and other articles, such as tooth powder and cosmetics, so that we ought not to regard the provisions of this Act of Parliament of 1812, and particularly the general words of the schedule, as referring to medicines only.

The first question which arises is, what is the effect of the two provisions taken together; the first with regard to the particular articles or classes of articles expressly specified to be liable to duty, and then the provision that all other articles are to be liable to duty which shall be by advertisement recommended to the public, and so forth. I cannot entertain a doubt that the articles made taxable by the general words of the schedule are different from the particular articles enumerated and specified in the schedule itself; otherwise I can give no effect whatever to the word "other."

But then it is contended that this article is not within the particular clause in the schedule commencing "waters, videlicet." It is said that although carbonic acid gas is evolved by the components of this article, it contains chlorate of potash, and so does not come within the definition of a composition used for the purpose of making a water impregnated with soda or with carbonic acid gas. I think, however, that though the water may be impregnated with forty other ingredients in a combined condition, or in a separate and distinct chemical condition, that cannot alter the effect of the words. What right have I to set aside those words, and treat them as if they were not within the Act of Parliament, because there is something besides carbonic acid gas which gives a different character to the soda, and which gives a different character to the carbonic acid gas? Upon that sort of speculation, by superadding words that are not in the Act of Parliament in question, the whole effect of the Act is to be done away with. I therefore hold that upon those clear and express words of the Act of Parliament, this being a composition used for the purpose of making a water impregnated with soda or carbonic acid gas, it was, by this Act of Parliament of 1812, one of the enumerated and specified articles made liable to duty, and therefore did not come within the general words. In dealing with the question, whether it comes within those general words, I ought to refer to s. 4 of the Act of 1812, which provides that confectioners and other dealers in articles of this description, who shall only sell any of the artificial or other waters mentioned in the schedule, to be drunk in their own houses or shops, need not take out a licence, provided the waters so sold are covered with stamped wrappers or

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labels. That may apply to some of these waters, but it only provides a species of immunity to a certain class of dealers in articles of this description, and would only qualify the enactment to that extent.

Then comes the repealing statute—though in saying repealing statute I follow the argument for the Crown a little too literally, because the counsel for the Crown invariably spoke of the Act of 1833 as if it repealed the former statute, and they confounded the word "statute" with a particular clause. This Act of Parliament of 1833 only repealed these words in the schedule, "waters, viz., all artificial mineral waters, and all waters impregnated with soda or mineral alkali or with carbonic acid gas," and so on. Now what was the effect of the repeal? I assume here that this article was taxable under the words "waters impregnated with soda or mineral alkali or with carbonic acid gas," because if it were not taxable under those words, I agree that it would be under the general words of the schedule; but we must assume that this article was then taxable under those words in the schedule, and that being so, what is the effect of the repeal? If anybody had told a person dealing in the particular article, "You have hitherto paid duty upon this article; here is an Act that cuts quite out of the schedule the whole of the words that apply to your preparation," of course he would say, "I am free."

Then comes the question what is the meaning of the general words—supposing that by the schedule it had been enacted that Warren's Analeptic Powders, Warren's British Tooth Powder, and all waters impregnated with soda should be liable to taxation, and supposing the liability to taxation on those three articles had been repealed by this 20th section of the Act of 1833, what would then have been the meaning of "and also all other?" The Crown must contend for this strange conclusion, they must contend for this construction of the Act of Parliament, that when by express terms a particular article is rendered not liable to duty it is at the same time liable to duty under another and general clause of the same Act of Parliament. It would be the same if it had happened to two or three of the tooth powder articles as to this particular article. Where an Act of Parliament repeals a clause, it is not that the Act of Parliament is repealed which

imposes the duty, but the clause of the Act of Parliament imposing the duty is repealed. We have only to substitute the word "clause" for "Act of Parliament," and then the dicta in *Surtees* v. *Ellison* (1), and *Kay* v. *Godwin* (2), apply, that where an Act of Parliament is repealed, the effect of the repeal is that it is to be taken as if the statute had never been enacted, except as to transactions begun or prosecuted while it was an existing law. Substitute, therefore, the word "clause" for "Act of Parliament," and this clause is to be taken as if it had never existed, and if that be so it must be taken as if those articles had never been taxed. What effect has that upon another and a totally different clause, which it is admitted applied before the repealing Act of Parliament to totally different subjects, which did not include the particular preparation in question? No judge ever laid down as law that where a particular clause in an Act of Parliament is repealed, the whole Act must be read as if that clause had never been enacted, all that can be said is that the clause is to be taken as if it never had been enacted, and if this clause had never been enacted, then no duty would ever have been imposed upon this article. Where an article has been expressly taxed, where it has been expressly enumerated and specified in the schedule, and where the provision relating to the particular article has been repealed, I cannot say that the moment the repeal took effect it gave a different meaning to another clause of the Act of Parliament, which taxes an additional and totally different description of articles. The repeal of that clause has indeed the effect of treating the clause of the Act of Parliament as if it had never been enacted, but the additional clause still remains what it was, that is to say, it relates to all descriptions of articles which are not enumerated. Taking the articles enumerated and specified which are liable to taxation, the result is that as to one of them the law has been repealed, and the article is no longer liable to taxation, but with regard to a thousand articles, the subject of another clause of the Act of Parliament, that clause remains in force, and it remains in force with the same meaning and the same effect that it had from 1812, when it was enacted. It does not include now, because it did not include then, and

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there are no words in the Act of 1833 to make it include, the before specified and enumerated articles. The general clause of the Act of Parliament introduced by the words "and also all other pills, powders, 'waters,'" and so forth, applies to an additional and different class of articles. They were liable to taxation from the year 1812 to the year 1833, and are so at the present day.

I think, upon these grounds, that the article made and sold by the defendant was made liable to taxation by the Act of 1812—that that liability was put an end to by the Act of 1833, and that it then ceased to be liable to taxation. Looking at the fact that this is a question of taxation, when in express words the liability to taxation on a particular article is put an end to, and by express words repealed, to tell a man who deals in that article, "You are still liable, the repeal goes for nothing," appears to me to be something startling; and nothing but some inflexible rule of law would induce me to hold that such was the effect of this Act of Parliament.

On these grounds, I think our judgment ought to be against the Crown; but the majority of the Court being of the contrary opinion, the judgment will be in favour of the Crown.

Judgment for the Crown.

Jan. 23. The defendant appealed.

The facts and the arguments appear in the judgments.

Two questions were discussed. One of fact and law, whether the composition called pyretic saline was used for the purpose of producing a "water" within the meaning of the first part of the schedule to 52 Geo. 3, c. 150; the other of law only, whether, the first part of the schedule having been repealed by 3 & 4 Wm. 4, c. 97, s. 20, artificial mineral waters, &c., became taxable under the general words at the end of the schedule.

Herschell, Q.C., Ince, Q.C. (*Brodie Cooper* with them), for the defendant.

Sir H. S. Giffard, S.G., and *Dicey*, for the Crown.

BRAMWELL, L.J. This judgment must be reversed. I cannot agree with the majority of the Court below. The first question

which has been argued before us is, whether after the passing of the 52 Geo. 3, c. 150, this article would have been within the description in the schedule "waters, videlicet, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters." Now this composition is in a solid state, and we have to inquire, first, whether it is used for the purpose of making a water: and next, whether what is made from it is a water within that description. I confess for my part that I should have had very great difficulty in holding that it was. I can understand that it might be said, it is not properly called a water, it is something else; but from that difficulty my mind is relieved by the evidence of the witnesses for the Crown, who have said that which is made by the use of this composition is properly called a water impregnated with carbonic acid. That is what they have said; it may be wrong for all I know; our decision, however, will not prevent the Crown from filing a fresh information against the defendant, and getting better evidence upon that point if they please; but what those witnesses have said in so many words is that that which is made by the use of this composition is a water impregnated with carbonic acid. It may be, as I said before, that this is a wrong description, and it may be that this should not be called a water, but that it should be called a medicine, or that it should be called a potash draught, but the evidence is to the contrary. Then one of the learned Barons in the Court below said: it is not within the above description, because it is not only impregnated with carbonic acid gas, but it has something else in it. Now, with great respect, I cannot see how that prevents its being a "water" impregnated with carbonic acid gas. To say that it was not a water impregnated with carbonic acid gas because there was something else in it, is to my mind a mistake, and I hardly know how to deal with it otherwise than by saying—although there seems to be no legal reason that can be given—that it is not true as a fact that the thing is not impregnated with carbonic acid gas because it has got something else in it. Probably, I should think, it would be found that there was scarcely anything impregnated with carbonic acid

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gas which had not something else in it, and even in this particular case if the potash were to be omitted there would be, as I understand, in the water obtained from this composition, tartarate of soda, and some small quantity of bi-carbonate of soda. It seems to me that the witnesses for the Crown have shewn that what is made of this composition is a water impregnated with carbonic acid gas within the meaning of this particular clause in the section.

The next question that arises is with regard to the repeal of this part of the schedule. The question is does the Act which repeals the specific words of the schedule, cause the articles, which would have been within it, to come within what I may call the tail of the schedule. It must be admitted, that if that specific clause had not been in the schedule beginning "waters, videlicet," with what follows, this composition would have been within the tail of the schedule, because it would then have been a preparation which by public notice and advertisement was recommended as being useful for the cure of certain diseases and disorders; but the question has to be considered with regard to the specific enactment as well as the general one. It seems to me that the effect of the specific enactment, in conjunction with the general one, was that this article was taxable under the specific, or, as I would rather call it, the schedule enactment, and not under the general one; and I think that may be made manifest in this way; it reads "Waters, videlicet, all artificial mineral waters." I will stop there. An artificial mineral water therefore, would have been taxable whether it had been claimed under a patent, or whether the inventor claimed to have any occult mode of preparing it, or whether or not he said it was good for human diseases. By the operation of the schedule enactment, an artificial mineral water would have been taxed, whether it were or were not within any of the categories in the end of the schedule, and would consequently, not have been taxable by virtue of that which is in the end of the schedule, because it would have been taxable whether the end of the schedule were there or not; consequently, the end of the schedule would not have applied to it in any sense. I care very little about the use of the word "other," but I think I should come to the same conclusion if it were not there. The schedule enact-

ment would have taxed these things whether they were sold as patent medicines or not; therefore, the schedule might be read "waters, videlicet, all mineral waters whether sold under a patent or under exclusive claim of right to them or not, shall be taxable;" that is the meaning of the schedule. Then comes the repeal, which says, "so much of the schedule as is contained in the following words," all artificial mineral waters, and so forth, and you may read in there as you might before, "whether claimed to be sold under patent or not," shall be, and the same is hereby repealed. That is the true construction of the schedule, and it is the true construction of the repealing Act. The argument on the part of the Crown is, that although the repeal must be read thus, "the schedule enactment which makes artificial mineral waters taxable whether they are patent waters or not, is hereby repealed," nevertheless, if they are sold under letters patent they are still taxable. I take articles sold under letters patent as representing the whole class mentioned in the tail of the schedule. I think it plain that this argument is erroneous. I think that cannot be. The schedule, notwithstanding the repeal, taxes the articles whether they are patent or not; the end of the schedule taxes patent articles. The repealing Act says, "you shall not tax artificial mineral waters whether patent or not;" the Crown says that they come into the end of the schedule, because they are patent; it seems to me plain to demonstration that it is not so.

Then it is argued that you cannot look at the repealed portion of the Act of Parliament to see what is the meaning of what remains of the Act. I know that is not the argument of the Solicitor-General, but that opinion has been expressed. I, however, dissent from it; if it were an accurate opinion, this consequence would follow, that an Act of Parliament which at one time had one meaning would by the repeal of some one clause in it have some other meaning. Thus, a duty is imposed upon race-horses, carriage-horses, riding-horses, and all other horses, then if the Act is repealed as regards race-horses, it is said that nevertheless you must look at the Act as though the words imposing the tax on race-horses had never been in at all, and that you must take in race-horses under the words all "other horses." I will apply these observations not to this Act, but to another

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Act. Suppose there was another Act which said So and so shall be the law, and then there was a subsequent Act which said that the old Act should not apply to certain matters, but that a new law should be created, and that there was no particular naming of the matters, so that you could only make sense of the second Act by looking at the first: according to the argument which has been used you could not look at the first Act; you must really regard the words in the first Act as obliterated. I should say that where an Act of Parliament has been repealed it is as to all matters completed and ended at the time of its repeal, as though it had never existed as a governing law with respect to these subject-matters. Now of course we ought to interpret the words which are used, first by forming an opinion as to what the intention of the legislature was, and then whether the words bear it out. In this case the intention of the legislature was to exempt these waters from taxation, and not to subject them to taxation even if the vendor of them should think fit to say that they were good for all sorts of diseases, or that he had some sort of patent, or some occult mode of preparing them. The intention was to exempt the article from taxation under all circumstances; as the Solicitor-General says, the legislature might have made their meaning more plain; the legislature might have said the schedule relating to "waters, videlicet, all artificial," &c., is repealed, provided that nothing shall repeal so much of the end of the schedule as would make them liable to duty, looked at as waters sold under the claim of an exclusive right, and so forth, as stated in the end of the schedule. The legislature has not done so for this reason: It intended to exempt the article from taxation, and it intended to exempt it from taxation whether the person vending it should or should not say he did something with regard to it which would otherwise have brought it within the object of the schedule. I am therefore of opinion that this judgment cannot be sustained, and must be reversed and the appeal allowed.

BRETT, L.J. There are two main questions in this case. The first is, under what part of the schedule to 52 Geo. 3, c. 150, would the defendant's composition have been taxable; and the second is, what has been the effect of the repealing statute?

The first question is divided into two parts. The first is a question of fact, and the other is a question of the construction of the statute. As to the construction of the statute it must be construed as if we had to construe it the day after it was passed. It is a statute taxing certain medicinal and commercial articles, and it uses therefore either scientific or commercial terms, or both. Amongst these terms it uses this term "waters," but with a particular meaning attached to it, that is to say, not all waters, but particular waters, using commercial or scientific phrases with regard to them, now it says "waters, videlicet, all artificial mineral waters." I cannot help thinking that taking that to be the commercial or scientific phrase, the question would be what the great majority of ordinary commercial people dealing in such articles, both vendors and purchasers, or what the great majority of scientific people would call "artificial mineral waters." Any water made artificially, which would be understood by all ordinary commercial people dealing in such things, both vendors and purchasers, as an artificial mineral water would be within it; and so if that were what all ordinary scientific people would consider as artificial mineral water it would not be untaxable merely because formed of ingredients in different quantities from those in natural mineral waters. Then it seems to me that this specific clause of the schedule goes further and makes something taxable which would not be known as artificial mineral water, but something, which by the same people, and in the same sense, would be known commercially or scientifically as water impregnated with "soda," or water impregnated with "mineral alkali," or water impregnated with "carbonic acid gas."

We come to the remaining part of the schedule. With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting—a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part. When a number of articles are specified, and after there is a general phrase at the end of the specific articles as there is here, that again is little more than a question as to convenience in drafting. When there are the words "all other things," it is only adding to the specifically named things other things which are not so specifically named; the things which

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come within the latter part of the schedule are different things from those which are specifically spoken of in the first part. The latter part is really just the same as if all the things which are proved finally to be within it had been specifically mentioned instead of being brought under the general phrase. If they had been specifically mentioned, it would be seen what precise effect the repealing of the statute would have with regard to them. So much for the construction of the first part of the schedule. Then comes the question under what part of it this composition comes. Now if this composition had resulted in that which ordinary people in dealing with it as a commercial matter would not have called a water impregnated with "carbonic acid gas," but which would have been called something else commercially or scientifically, I should have thought it was not within the specific part of the schedule, and so everybody at the trial and everybody on both arguments admitted. Then was this a composition which would, when used with water, produce not a water but something which everybody would call a medicine? It was suggested that that was admitted, but if it had been admitted it was impossible to suppose that any point could have been reserved in the case or that any argument could have taken place. I cannot help thinking that the point taken at the trial was this: that although the use of the composition did result in that which would be called by commercial or scientific people a water impregnated with carbonic acid gas, yet, as a matter of law, it was not so because a foreign substance was introduced into it. That was suggested on one side and commented on on the other, not as a question of fact, but as a question of law, the fact being undoubted and admitted. Therefore I take it that the admitted facts were these: that this composition when used with water did produce that which all ordinary commercial or all ordinary scientific people would call a water impregnated with carbonic acid gas, and that there was a foreign substance in it, and the argument was whether the mere fact of that foreign substance being in it, prevented it from being, as a matter of law, a water impregnated with carbonic acid gas, within this part of the schedule. I am of opinion that that cannot be so upon the construction which I have given to that part of the schedule, and therefore, notwithstanding the presence of that

foreign substance, it remains a water impregnated with carbonic acid gas within the meaning of that part of the schedule, and therefore would have been taxable under that part of the schedule before the passing of the repealing Act. If it was within that part of the schedule, then it was not within the subsequent part of the schedule, because the latter part does not apply to the waters which are within the specific enactment, but to other waters. But if this had produced, when used, something which ordinary people would not have called water impregnated with carbonic acid gas, then although there had been water in the result, and although there had been carbonic acid gas in the result, I should have thought that it would not have been within that first part of the schedule.

Then we come to the next question of law, viz., what is the effect of the repealing statute? The judgments of the majority in the Exchequer Division lay down that the moment an Act of Parliament is partly repealed we cannot look at the repealed part for any purpose, but that the repealed part must be regarded as if it had never been enacted. I cannot help thinking that that part of the judgments is not sustainable, for what we have to consider is not what was the construction of the first statute, but what is the effect of the repealing statute. We cannot tell what is the effect of the latter without looking at the meaning of the statute which it has repealed. We must treat it as we treat all statutes for the purpose of construing them; we must look at the facts which were existing at the time the Act passed to see what was its meaning. I do not say that the effect of repealing a portion of a statute can never be to alter the remaining portion of the statute, for supposing an Act of Parliament said that such and such specified things shall not be subject to duty, and the repealing statute were to strike out the word "not," and it were to say, "be it enacted that the word 'not' be repealed," it is obvious that then the effect of the repealing statute is to alter the former statute, and to give a different effect to it; but where in the statute which is to be repealed there are separate and distinct enactments, and the repealing statute simply repeals one of those enactments, it seems impossible to construe the meaning of the repealing statute to be that it thereby gives a different meaning to the enactments

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with which it does not assume to deal at all. I think that the two enactments in the first statute are two separate and distinct enactments: the one is with regard to specified waters; the other is with regard to "other waters." Then, the repealing statute repeals one of those enactments, and it is suggested that it thereby alters the meaning and effective application of the other separate and distinct enactment to which it does not refer. I think that is a wrong mode of construing, and that cannot be the intention of the legislature. At all events, it is not in effect that which the legislature has done; and where the legislature by its language deals with one enactment only, which is a separate and distinct enactment from the one called in question, it is a wrong mode of construction to say that the repealing statute has any effect whatever, either as to the construction or the application of the independent enactment.

For these reasons I think that the judgment of the Court below must be reversed.

COTTON, L.J. I think the judgment cannot be maintained. In this case the Crown claims duty upon the ground that the defendant is selling a composition used for making a water which is advertised in a printed paper wrapt round the bottle in which the composition is sold, and described as being beneficial for a variety of diseases. The question is whether or no, upon the construction of the Act of Parliament with which we have to deal, the composition comes within that which has been called the tail of the schedule. I will deal presently with the question of the effect of the repealing Act, but first I will deal with the construction of 52 Geo. 3 as it originally stood, and, curiously enough, we see the parties placed in this position: that the defendant is saying, "I was taxable under a particular part of this section," and the Crown saying, "No, you would not have been taxable under that." The question then is, whether a certain specified portion of what is called the schedule, as distinguished from the tail of the schedule, did or did not include this particular composition. What is called the tail begins in this way: "Also all other pills, powders," and things which are sold in the way in which this is sold. Treating this as a matter of construction, without

reference to the question whether it was imposing a tax upon anybody or anything else, I should say that the tail of the schedule intends, as a matter of description, to include and refer to something additional to that described in the previous part of the schedule; and the question therefore arises, is or is not this preparation, as a matter of description, within the previous part of the schedule? if not, it comes within the tail. The description in the schedule is this: "Waters, videlicet, all artificial mineral waters and all waters impregnated with soda or mineral alkali or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters." The argument has been, and I rather think some of the judgments in the Court below went upon this, that although the draught in the tumbler of water, into which this composition is poured, does become water impregnated with carbonic acid gas, it is not within what is described in this part of the schedule, because there is another ingredient in it which may have or has a certain medicinal effect. As a matter of law, it is wrong to say that a water ceases to be within the description of this particular schedule, a water impregnated with carbonic acid gas, either because it has a medicinal effect or because it contains some other substance besides that which causes the impregnation with carbonic acid gas. With regard to the question as to its being medicinal. This Act was primarily intended to deal with medicines, and in my opinion it is clear that these mineral and carbonic acid gas waters, if they came within the description in the schedule, would come within it although they had medicinal qualities; I should say that this description was pointed at that which was medicinal, but also, no doubt, included besides that which was not medicinal or intended to be such; that which from its being within the description of a water impregnated with "carbonic acid gas" was taxable, although it was to be used as a beverage. Therefore I think it cannot be said that the water in question does not come within the description in the body of the schedule. In fact, one of the witnesses for the Crown describes a mineral water as that which has medicinal properties. But does the addition of something else prevent it from coming within the description in the schedule? decidedly not; and if this particular

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portion had not been repealed, it could never have been held that a mixture for the purpose of making a water impregnated with carbonic acid gas was free from taxation, because it had in it two per cent. of something else which was not used for the purpose of making carbonic acid gas. The question is this: whether it can be said that in substance this water is a carbonic acid gas water? that is to say, aërated water as it is usually called. If in substance it is not, but something else, then it would not be within the first part of the schedule; that is a question upon which there should have been evidence submitted to the jury, if it had been intended to contend that this water is not aërated water but in substance something else.

I think that this composition, on the construction of the Act of Parliament, comes within the words "waters, videlicet," &c., in the body of the schedule and not within the tail of the schedule. Then, what is the effect of the repealing statute? The statute repealing that part of the schedule does so in rather awkward terms. "So much of the said schedule as is contained in the following words, that is to say, as relates to waters, videlicet, shall be and is hereby repealed." The effect of this is that the portion of the schedule so repealed is no longer operative for the purpose of imposing any tax. But for the purpose of construing words of reference, that is, for the purpose of seeing what as a matter of construction is meant by the words in the tail of the schedule, "all other waters, &c.," I am of opinion that we must look at what goes before though no longer operative.

The result in my opinion is that, as a matter of construction, this composition came within the description in the body of the schedule which has been repealed, and not within the description in the tail of the schedule, and that the effect of the repealing statute is not to bring it within the tail of the schedule. If it is contended that the intention and effect of the repealing statute was to make these things not taxable if used or sold as beverages, but to tax them if used or sold as medicine; that is not in terms in the Act of Parliament, and if that was the intention, it ought to have been so stated by words effectual for the purpose. It is not only articles which are sold with wrappers round them describing them as useful to cure diseases, which are taxed under the tail of the

schedule: it taxes all things which come under the description of having heretofore in any way been held out by written advertisements as curing diseases, so that we should at once come to a great difficulty, if we came, as a matter of construction, to the conclusion that the effect of the repealing Act of Parliament is to make them taxable if sold as medicines, when they were not taxable if sold only as beverages. I think the defendant is not liable to the duty, and that the judgment must be reversed.

Judgment reversed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Crouch & Spencer.*

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June 25.

County Court—Appeal—Jurisdiction to hear Appeal—Reference of Suit in County Court to Arbitration—Refusal of County Court Judge to set aside Award—County Courts Act, 1846 (9 & 10 *Vict. c.* 95), *s.* 77—*County Courts Act*, 1850 (13 & 14 *Vict. c.* 61), *s.* 14.

A suit in a county court having been referred by the judge thereof to an arbitrator, under 9 & 10 Vict. c. 95, s. 77, and the arbitrator's award having been entered up as the judgment, an application was made to the judge to set aside the award, on the ground that the arbitrator had exceeded his jurisdiction by taking into consideration matters not referred to him. The judge having refused this application:—

Held, that the Court of Appeal had no jurisdiction, under 13 & 14 Vict. c. 61, s. 14, to entertain an application on appeal from the judge to set aside the award.

An action having been brought in the county court of Shropshire was referred by the judge, with the consent of both parties, under the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 77 (1), to

(1) By 9 & 10 Vict. c. 95, s. 77, "The judge may in any case, with the consent of both parties to the suit, order the same with or without other matters within the jurisdiction of the Court in dispute between such parties to be referred to arbitration to such person or persons and in such manner and on such terms as he shall think reasonable and just; and such reference shall not be revocable by either party except by consent of the judge; and the award of the arbitrator or arbitrators or umpire shall be entered as the judgment in the cause, and shall be as binding and effectual to all intents as if given by the judge: provided that the judge may, if he think fit, on application to him at the first Court held after the expiration of one week after the entry

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the deputy registrar, who made his award in favour of the plaintiff for 44*l.* odd, and judgment was entered up accordingly for him for that amount. The defendant then applied to the county court judge under s. 77 to set aside the award, on the ground that the deputy registrar had taken into consideration matters and accounts not referred to him. The judge having refused the application, a rule nisi to set aside the award, on the ground, among others, that it was void, because it extended beyond the submission in the subject matter, was obtained in this Division, against which cause was shewn by

Jelf, for the plaintiff, who contended that this Court had no jurisdiction to hear the appeal. The Court called on

J. C. Lawrence, Q.C. (*Arthur Yates* with him), for the defendant, in support of the rule. The county court judge has, by 9 & 10 Vict. c. 95, s. 77, power to refer the cause with the consent of both parties and also, "if he think fit," to set aside the award. The expression "if he think fit" is the same as that used in giving the judge power to order a new trial under s. 80 of the same Act, on which question the right of appeal admittedly exists. The right of appeal is given by the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 14, and the refusal of the judge in the present case is a "determination or direction of the Court in point of law" within that section. (1)

PER CURIAM (Kelly, C.B., and Pollock, B.). On such interlocutory decisions as the present there is no appeal. The right of appeal is given by 13 & 14 Vict. c. 61, s. 14, which enables the

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of such award, set aside any such award so given as aforesaid, or may with the consent of both parties aforesaid revoke the reference or order another reference to be made in the manner aforesaid."

(1) By 13 & 14 Vict. c. 61, s. 14, "If either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said Court in point of law or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior Courts of Common Law at Westminster . . . . . and the said Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and may make such order with respect to the costs of the said appeal as such Court may think proper; and such orders shall be final."

Court of Appeal either to order a new trial, or to order judgment to be entered up for either party. No other jurisdiction is given. In the present case the Court cannot enter up judgment, and a new trial would be no remedy, the application being to set aside the award.

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Rule discharged with costs.

Solicitors for plaintiff: *Smith, Fawdon, & Low, for Phillips, Osborne, & Phillips, Shifnal.*

Solicitors for defendant: *Robinson & Preston, for J. Leake, Shifnal.*

DELMAR *v.* FREEMANTLE.

1878 *June* 5.

Practice—Rule or Order to shew cause in any Action—Notice of Motion—Ruling Sheriff to pay Money levied under Fi. Fa.—Judicature Act, 1873 *—Order LIII., rr.* 2, 3, 4.

A rule calling on a sheriff to shew cause why he should not pay to the plaintiff's solicitors the money levied under a fi. fa., is a rule or order to shew cause in an action within the meaning of Order LIII., Rule 2, and the application cannot be heard unless notice of motion has been given to the sheriff under Order LIII., Rules 3 and 4.

THE plaintiff having obtained judgment in this action, issued a writ of fi. fa. indorsed to levy the sum of 38*l.* 18*s.* 10*d.* debt and costs. The sheriff of Surrey having been ruled to return the writ, filed a return that he had levied the amount indorsed on the writ, but failed to pay the money. The plaintiff applied ex parte for a rule calling on the sheriff to shew cause why he should not pay the money to the plaintiff's solicitors. The affidavit in support was entitled in the action *Delmar* v. *Freemantle.*

McLeod Fullarton, for the plaintiff. This is not a rule or order to shew cause in an action, and therefore notice of motion need not be given under Order LIII., Rules 3 and 4.

[CLEASBY, B.:—Does not Order LIII., Rule 2, mean rules or orders calling on the parties to an action and who are before the Court? The sheriff, though an officer of the Court, is not a party to the action.]

Just so. The plaintiff might either bring an action against the sheriff for the amount or rule him to return it. Having chosen the

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latter remedy, the application is not in an action, and the practice is not altered by the Judicature Acts or rules.

KELLY, C.B. I think there is considerable difficulty in the terms of Order LIII., Rule 2, as to whether this really is a rule or order in an action. One test is, that the affidavit is entitled in the cause, the plaintiff in which issued execution, and now claims the payment of the money. It is, therefore, difficult to say that the rule now applied for, which must be entitled in the cause, is not in the action. I am inclined to think that the case is within Order LIII., Rule 2, and that notice of this motion must be given to the sheriff.

CLEASBY, B., concurred.

Rule refused. (1)

Solicitors for plaintiff: *Lewis, Munns, & Longden.*

May 18.

[IN THE COURT OF APPEAL.]

WEIR *v.* BELL AND OTHERS.

Company—Fraudulent Prospectus—Liability of Directors for Fraudulent Statement of Agent—Principal and Agent.

A company formed to work a mine was compelled from want of funds to cease working: money was then advanced to them by some of the directors, and amongst them Barnett and Baldwin. Afterwards, at a general meeting of the company, held in order, amongst other things, to provide for the existing deficit and for working expenses, the directors were authorized to issue debentures on such terms and for such amounts as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus, bearing the names of Bell and others as directors, and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others purchased debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless, the plaintiff brought an action for damages against Bell and others in

(1) In Trinity sittings the motion was renewed upon an affidavit that notice of the motion had been given to the sheriff, and no one appearing for the sheriff an order was made absolute in the terms prayed.

respect of the statements in the prospectus, some of which were alleged to be fraudulent.

The jury found that the prospectus contained statements of fact which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money; that none of the false statements were made by Bell personally or by his authority; that the brokers had authority to issue a prospectus but no authority to include in it statements which were fraudulent; and that Bell derived no benefit from the money raised by the debentures:—

Held, by Cockburn, C.J., Bramwell and Brett, L.JJ., Cotton, L.J., dissenting, affirming the judgment of the Exchequer Division, that the defendant Bell was not liable.

By Cockburn, C.J., and Brett, L.J., on the ground that though a party as director to the receipt of money, the defendant Bell was not aware of the falsehood of the statements contained in the prospectus, and derived no personal benefit from the receipt of the money.

By Bramwell, L.J., that the defendant Bell had been guilty of no moral fraud, and not being the principal of the brokers could not be held to have impliedly undertaken for the absence of fraud in them in issuing the prospectus.

By Cotton, L.J., that the defendant Bell was liable in an action to the plaintiff, for it was his duty as director to ascertain whether the statements in the prospectus were true or false.

APPEAL from the judgment of the Exchequer Division in favour of the defendant Bell. (1)

Action against six directors of a company incorporated under the Companies Acts, 1862 and 1867, for damages sustained by the plaintiff, who had become a purchaser of debentures of the company, upon the faith of certain statements in a prospectus issued by the authority of the defendants, some of the statements being alleged to be false and fraudulent to the knowledge of the defendants. The debentures had since become worthless.

The facts and arguments are fully noticed in the judgments of the Court.

Feb. 26, 27; Mar. 2. *Sir H. S. Giffard, S.G., A. Charles, Q.C.* (*W. Barber* with them), for the plaintiff.

Digby Seymour, Q.C., and *Lumley Smith*, for the defendant Bell. In addition to those mentioned in the Court below and in the judgments of the Court of Appeal, the following cases were cited: *Mersey Docks Trustees* v. *Gibbs* (2); dictum of Lord Campbell, *Wilde* v. *Gibson* (3); *New Brunswick and Canada Ry. Co.* v.

(1) Ante, 32.

(2) Law Rep. 1 H. L. 93.

(3) 1 H. L. C. at p. 615.

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Connybeare (1), opinions of Lord Westbury, at p. 725, of Lord Cranworth at p. 740, and of Lord Chelmsford at p. 749; *National Exchange Co.* v. *Drew* (2); *Davidson* v. *Tulloch* (3); *Brady* v. *Tod.* (4)

Cur. adv. vult.

May 18. The following judgments were delivered:—

COTTON, L.J. This is an appeal of the plaintiff from the decision of the Exchequer Division directing judgment to be entered for the defendant Bell. The action was brought against various directors of the Knightor, Treverbyn, and Resugga Hæmatite Iron Ore Mining Company, Limited, including Mr. Bell, and by it the plaintiff sought to recover damages which he alleges he sustained by reason of his being induced, by certain fraudulent misstatements in a prospectus issued by the authority of the defendants, to take from the company certain debentures.

On the 31st of October, 1873, Bell, who had for some time been a shareholder, became a director of the company. At this time the directors were desirous to raise money by the issue of debentures, and they had been authorized so to do by a special meeting held on the 29th of September, 1873.

Mr. Bell attended a meeting of the board held on the 5th of November, at which a resolution was passed authorizing either the solicitor or secretary to employ brokers to place the debentures.

Under this resolution, Messrs. Stewart & Lambe were employed as brokers to place the debentures, and they, acting without any express directions from Bell, prepared and issued the prospectus complained of. It set forth various statements as to the condition and prospects of the company, which have been found to be false. There can be no doubt that the plaintiff took his debentures on the faith of these statements. The defendant Bell had before the meeting of the 5th of November seen a report and balance sheet, the statements of which, especially a statement in the report that the works had been suspended since the 1st of January, 1873, shewed the untruth of those representations in the prospectus, which have been found to be false and fraudulent. The defendant

(1) 9 H. L. C. 711; 31 L. J. (Ch.) 297.

(2) 2 Macq. at pp. 124, 126, 127.

(3) 3 Macq. 783.

(4) 9 C. B. (N.S.) 592; 30 L. J. (C.P.) 223.

Bell went abroad shortly after the board meeting of the 5th of November, but he returned to England before the debentures purchased by the plaintiff were allotted to him, and was present at the meeting of the board at which debentures, including those held by the plaintiff, were allotted. The jury found that Mr. Bell was not guilty of any personal fraud, that he derived no benefit from the money raised by the debentures, and that Messrs. Stewart & Lambe the brokers were his agents in respect of the statements in the prospectus which, as I understand the finding, means that the brokers had authority from Mr. Bell to issue a prospectus, but no express authority to include therein the statements which are found to be fraudulent. On these findings, the Exchequer Division held that Mr. Bell was not liable to the plaintiff, and the question is whether that judgment can be maintained.

It is urged on behalf of Mr. Bell that he never saw the prospectus in question, that the brokers were servants of the company, and not of himself or of the other directors, and that in the absence of any personal knowledge on his part of the fraudulent statements, though the company as the principal of the brokers might be made liable, he cannot be. The judgment of the Exchequer Division, so far as it refers to the case of Mr. Bell, is very short. It states that the finding of the jury that the brokers were his agents in making the statements, was contrary to the evidence, and therefore directed judgment to be entered for Mr. Bell; and they apparently did so on the ground, considered at much length in the previous part of their judgment, that the brokers were acting in the matter as servants or agents of the company, and that the company as principals, and not the directors, must be answerable for their misstatements. I cannot agree with this opinion. Even if the company could in an action of deceit be held liable for the misstatements in the prospectus, on which I express no opinion, it was part of the duty of the directors to issue the debentures, and I am of opinion that the brokers in preparing and issuing the prospectus must be considered as discharging for the directors part of the duty confided to them by the resolution authorizing the issue of the debentures, that is, as acting for the directors in making the statements contained in the prospectus. This was the finding of the jury, which in my opinion was not either contrary

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to the evidence or without evidence to support it. When we look at the prospectus, it does not purport to be the prospectus of the brokers. It states that the directors were prepared to receive applications for the debentures, and annexed to it is a form of application addressed to the directors, and referring to the prospectus, and the defendant Bell, together with the other directors, acted on this in allotting the debentures.

The prospectus must, in my opinion, be considered as the statements of the directors. It is true that Mr. Bell did not see the prospectus, but in November, whilst he was abroad, he learnt from an advertisement in a newspaper that a prospectus had been issued, and though that advertisement does not contain the statements of the prospectus which have been found to be fraudulent, it gives the summary of the prospectus, which in my opinion ought to have put Mr. Bell on inquiry, knowing as he did the actual state of the company, as to the contents of the prospectus. He certainly knew that the debentures would be applied for in reliance on the statements contained in the prospectus, and in my opinion it was under the circumstances his duty to ascertain what those statements were. He neglected this duty; had he looked at the prospectus he would have seen that material statements were untrue. It is well established that in an action of deceit a defendant may be liable not only if he has made statements which he knows to be false, but if he has made statements which in fact are untrue, recklessly; that is, without any reasonable grounds for believing them to be true, or under circumstances which shew that he was careless whether they were in fact true or false. On the same principle, in my opinion, if a defendant has employed an agent to issue a prospectus or other document on the statements of which persons are invited to contract, he will be liable to those who act to their prejudice on reliance on false statements made in this document, if he knew facts which shewed the untruth of those statements, but was so careless as to the representations made by his agent as not to do, what in my opinion it was his duty to do, viz., to look at the document issued by his authority. This view is supported by Lord Chelmsford in moving the judgment of the House of Lords in *Peek* v. *Gurney* (1), as to the case of Mr. Barclay.

(1) Law Rep. 6 H. L. at p. 392.

In my opinion, therefore, judgment in the action ought to have been against Mr. Bell.

BRAMWELL, L.J. I think that the judgment for the defendant Bell should be affirmed. I think I clearly understand the findings of the jury, and I agree with them. They acquit the defendant Bell of actual fraud, that is to say, of knowledge of the contents of the prospectus combined with knowledge of those facts that make it false; but they say that he, as one of the directors, having authorized the raising of money on debentures, authorized its being done in the usual way; that issuing prospectuses is usual, and so he authorized the issuing of prospectuses, and in that way of the one actually issued. On these findings the question turns. There is no motion for a new trial. Nor do I think there would be ground for one if there was. That the defendant was acting bonâ fide cannot, I think, be doubted. We must, therefore, act on the finding of the jury. The defendant, then, is not actually guilty of this fraud. He did not commit it himself, nor procure its commission knowingly. Had he done so he would have been liable, whether as director, manager, printer of the prospectus, or entire stranger to the company, and acting merely from mischievous love of roguery. But this is not the case.

I am of opinion, with an exception I will presently advert to, that to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shewn and correlative right, and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty. I see no such right and duty here, nor any ground for saying they exist. But it is said that they do, that there is an exception, the one above referred to, to the rule that a man is only liable for fraud when it is actual fraud, and that though not morally fraudulent himself, he is in some cases liable for the fraud of his agent; and for this *Barwick* v. *English Joint Stock Bank* (1) and the cases

(1) Law Rep. 2 Ex. 259.

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following them are cited. I am not going to say that case is not law. In the first place, we are bound by it. In the next, it has been so much approved and followed, that it has become part of the law, and, lastly, it is undoubtedly a most useful and convenient rule that principals should be responsible for damages occasioned by the fraud of their agents acting within the scope of their authority, at least to the extent of the gains of the principal, especially now that so much of the world's business is carried on by corporations. But, with all respect be it said, the reasoning in *Barwick* v. *English Joint Stock Bank* (1) is not satisfactory. Willes, J., says: On the question "whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Now, with very great submission, there is a very obvious distinction. Fraud is always wilful, and a master as a rule is not liable for the wilful wrong of his servant. "The general rule," proceeds the learned judge, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted on every day in running down cases." The illustration is unfortunate, for it is certain that there is no such liability where the act of the servant is wilful. He then cites *Ewbank* v. *Nutting* (2), where the owner of a ship was held liable for a tortious conversion by the captain of part of the cargo by selling it. That case, however, was expressly decided on the ground that the captain was acting for the owner within the scope of his authority. A similar remark applies to the next case cited. The principle that governs such cases as these is not that the master is liable for the acts of his servant. It is the liability of principal for the acts of his agent. For suppose the defendants had not been a joint stock company but a private partnership, they would (if the decision is right) have been liable; and suppose the fraud had been committed by one of the firm, surely the other partners would have been liable. It seems to me then that *Barwick* v. *English Joint Stock Bank* (1) cannot be supported on the reasons given. It is also remarkable

(1) Law Rep. 2 Ex. 259. (2) 7 C. B. 797.

that the counsel for the plaintiff in that case, in his opening, referred to cases in equity only in supporting his proposition. There is a suspicious air of novelty in the decision. It is always prominently put forward in subsequent cases. But though doubting the reasoning on which it is founded (if one may say so without presumption) I think it may be supported on other grounds. It is important to put the case on its true ground. I think that every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract. I retain the opinion I expressed in *Udell* v. *Atherton* (1), and mean what I say now to be consistent with it. Has this defendant so undertaken for the absence of fraud in those who prepared and issued this prospectus? I think not. The company has. The company is subject to actions to recover the money paid to it or to recover damages for the frauds in question. The defendant had undertaken nothing. Respondent superior. The defendant is not superior. If he is, he is either joint principal with the company, which is impossible, or he and the directors are one principal and the company a second principal, which is equally impossible.

I need not say that I think none of the other cases founded on *Barwick* v. *English Joint Stock Bank* (2) inconsistent with this; on the contrary, the principle I have ventured to suggest would support them all. I wish to add, that assuming *Barwick* v. *English Joint Stock Bank* (2) to be rightly decided and on right principles, it does not for the reasons above given, include the present case. I am of opinion that the judgment should be affirmed.

COCKBURN, C.J. This is an appeal from a judgment of the Exchequer Division, in an action brought by the plaintiff against several defendants, and amongst them against Mr. Valentine Grame Bell, as directors of the Knightor, Treverbyn, and Resugga Hæmatite Iron Ore Mining Company, Limited, to recover a sum of 700*l.* advanced by him to the said company on debentures, on the ground that he had been led to advance the money on

(1) 7 H. & N. 172; 30 L. J. (Ex.) 337. (2) Law Rep. 2 Ex. 259.

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the faith of statements contained in a prospectus issued by the authority of the defendants, which statements were false and fraudulent. Judgment having been given in the Exchequer Division in favour of the defendants, this appeal is brought against that decision so far as it relates to the defendant Bell alone; but it is impossible to dispose of Bell's case without referring to the facts and the law as affecting the defendants generally.

We must take it, on the findings of the jury, that certain material statements contained in the prospectus—such as the amount of capital stated to have been subscribed—that the mine was in working order—that its actual yield amounted to 160 tons per week from one shaft, to which two other shafts were about to be added—that the property was worth 30,000*l.*, and could be sold at any time for that amount—that the money proposed to be raised on debentures would be used in the development of the property—were false; as also that it was on the faith of these statements that the plaintiff had been led to advance his money. Under these circumstances there can be no doubt that the plaintiff would be entitled to recover back his money from the company. The question here is, 1st, whether he can recover it from the directors as having authorized the issuing of the prospectus, although they were not cognisant of the false statements contained in it; 2ndly, whether, independently of this general ground, the defendants, and more especially the defendant Bell, have by their individual conduct rendered themselves liable to the plaintiff.

The facts are these. The company had been formed in 1872; but in January, 1873, it was compelled to cease working from want of funds. Between that time and the ensuing month of August, money was advanced by the defendants (with the exception of the defendant Bell), then being directors of the company, and ore but to a small extent only was raised. At the annual general meeting of the company held on the 29th of September, 1873, the directors were authorized to raise money on debentures; and at a subsequent meeting of the directors held on the 8th of October, it was agreed that the defendants, Baldwin and Furnival, should make further advances for taking up certain bills, and that the repayment of these, and of the former advances made by defendants, should be made out of the proceeds of the deben-

tures to be issued. At a meeting of the directors of the 5th of November, it was resolved that "the secretary be authorized to employ brokers to place debentures to produce 10,000*l.*, at a discount of 5 per cent., and a commission not exceeding 1 per cent.;" and acting on this authority the secretary employed Stewart & Lambe, who are brokers, to place the debentures; and they, without express authority, but as it seems in the ordinary course of business adopted on such occasions, published the prospectus, which was prepared by their clerk—on what instructions or information does not appear—and which contained the misrepresentations complained of. The money raised on the debentures was paid into the company's bankers, and part of it was applied to the repayment of the advances which had been made by the defendants with the exception of Bell. In the sequel the company was unable to go on, and in January, 1875, was wound up.

Upon these facts the Court of Exchequer Division gave judgment in favour of the defendants, on the ground that Stewart & Lambe, the brokers, in issuing the prospectus, had acted as the agents, not of the defendants, but of the company; that the directors had been merely the officers and agents of the company in carrying into effect the resolution of the company that debentures should be issued; and in doing what was necessary for that purpose, inter alia in directing that a prospectus should be prepared and published, had been in no sense principals: consequently that the rule, that a principal who derives benefit from a fraud committed by his agent in the course of his employment becomes liable to a party injured by the fraud, has here no application, though upon the authority of *Barwick* v. *English Joint Stock Bank* (1), the fraud in question would have made the company liable, had the action been brought against them.

I concur in the view that the defendants, in what they did, were acting as the agents of the company, and not as principals, and therefore that they would not be liable, generally speaking, for misrepresentations made without their authority by persons employed by them on behalf of the company, and who in such employment were acting, not as their agents, but as the agents of the company. But the Court below appear to have overlooked a cir-

(1) Law Rep. 2 Ex. 259.

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cumstance which, as it seems to me, makes all the difference—namely, that, with the exception of the defendant Bell, all the defendants, though not parties to the issuing of the prospectus as fraudulently framed, yet knowing that it had been issued, and with the knowledge of its fraudulent character, which their perfect acquaintance with the affairs of the company must have given them, not only allowed the plaintiff and others to advance their money on the faith of the false representations contained in it, and by receiving the money became parties to the fraud, but, on their own authority, applied a considerable portion of the money so received to the discharge of their own pecuniary claims on the company, claims which the company had no other means whatever of satisfying. Even the defendant Barnett, who left England in August, 1873, and did not return till 1874, and who was ignorant of all that was done in the interval, inclusive even of the fact of the payment of the amount due to him from the company, the money having been paid to his agents in his absence, having retained the money when the facts came to his knowledge, stands on the same footing with the rest.

Now I take it to be undoubted law that, if an agent in the course of his employment commits a fraud upon another party, whereby damage ensues to the latter, he will be liable to the party wronged, though his principal would be so likewise. The case of *Henderson* v. *Lacon* (1) proceeded on this principle. And in *Cullen* v. *Thompson's Trustees* (2) Lord Westbury says, "All persons concerned in the commission of a fraud are to be treated as principals; no party can be permitted to excuse himself on the ground that he acted as the agent or servant of another." A fortiori, this would be so where the agent himself derives benefit from the fraud.

The present case differs, it is true, in this, that here the defendants, being the agents of the company, employed sub-agents to publish the prospectus, but were no parties to the fraudulent statements contained in it, such statements having been published by the sub-agents without their authority or knowledge. But having, with the exception of the defendant Bell, become aware of those statements, and being also aware of their falsehood, they

(1) Law Rep. 5 Eq. 249. (2) 4 Macq. 424.

were parties to the issuing of the debentures, and applied a considerable portion of the proceeds to the satisfaction of their own claims on the company.

Now I apprehend that where an agent employs a sub-agent, and the latter, in the course of his employment, is guilty of fraud or misrepresentation, and the agent, with knowledge of the fraud, derives a material benefit from it, the case becomes analogous to that of a principal who profits by the fraud of his agent, the principle being that he who profits by the fraud of one who is acting by his authority, though committed without his authority, adopts the act of the agent, and becomes responsible to the party who has been imposed upon and has sustained damage by reason of it.

If, therefore, the case of the defendant Bell, with which alone we have to deal—as it is only against the decision of the Court below in his favour that the present appeal has been brought—had been undistinguishable from that of the other defendants, I should not have felt warranted in affirming the decision. But his case differs from that of the other defendants in two most important particulars. First, that though party to the receipt of the plaintiff's money, he does not appear to have been at that time acquainted with the real state of the company's affairs, and thus aware of the falsehood of the statements contained in the prospectus; secondly, that none of the money actually came into his pocket.

It appears that Mr. Bell became a shareholder in the company at the instigation of the defendant Barnett in June, 1872, under a belief that the concern would be a successful one. He took 100 shares, and paid 1000*l*. He attended the general meeting on the 29th of September, 1873, at which it was resolved to raise money on debentures, and on the 31st of October he became a director of the company. He was no party to the arrangement of the 8th of October, at which it was resolved to repay the advances made by the directors out of the money to be raised by the issue of debentures. He was present, as director, at the meeting of the 5th of November, at which the secretary was authorized to employ brokers to place the shares; and, as it appears that in the ordinary course of business it would be incidental

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to such employment that the brokers should issue a prospectus, the jury may have been warranted in finding that by joining in that resolution he constituted the brokers his agents to issue a prospectus. But of the prospectus as published he knew nothing till some time after its publication. He left London for the Continent on the evening of the 5th of November, and did not return till the 25th, the prospectus having been issued, without his knowledge, in the interval. He was no party, directly or indirectly, to the statements contained in it. He, of course, became aware of the prospectus afterwards, and knowing the statements contained in it, was a party to the receipt of the plaintiff's money on the 26th of November. But it does not appear that he was then aware of the real state of the company's affairs. He swore on the trial that he had no such knowledge beyond what was afforded by the reports of the company's engineer produced at the meeting of the 29th of September—reports which did not disclose the true state of affairs—and that when he became aware of the statements put forth in the prospectus he had no reason to believe them to be untrue; and there was no evidence to rebut his statement. I cannot, therefore, say that he was guilty of fraud in receiving the plaintiff's money on behalf of the company; and, as has been already stated, he derived personally no benefit from the receipt of it.

In the result Bell has been guilty of no fraud; he is not a principal deriving a benefit from a fraud committed by his agent procuring that benefit; nor, indeed, has he derived any benefit from the fraud committed by the sub-agents whom he was authorized to employ on behalf of the company. Upon this state of facts I think the plaintiff fails to establish the liability of the defendant Bell. While, therefore, I am unable to adopt the grounds on which the judgment of the Exchequer Division is based, I am of opinion that, on the special grounds to which I have referred, that judgment in the case of the defendant Bell should be upheld and this appeal dismissed.

My Brother Brett concurs in this judgment.

Judgment affirmed.

Solicitor for plaintiff: *Fox.*

Solicitors for *Bell: G. S. & H. Brandon.*

[IN THE COURT OF APPEAL.]

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July 2.

BERDAN *v.* GREENWOOD AND ANOTHER.

Rules of the Supreme Court, Order XXVII., r. 1; *Order XXX.—Pleading—Embarrassing Defence—Payment into Court and Denial of Plaintiff's Causes of Action pleaded to same part of Statement of Claim.*

As a general rule, a defendant may by his statement of defence deny the plaintiff's causes of action, and at the same time plead payment into Court in respect of the whole or any part of them.

Quære, whether the general rule above mentioned may under special circumstances include actions brought to try a right of or in respect of property which is denied, or to establish character which has been assailed, and actions where the plaintiff is by the statement of defence charged with fraud.

Quære, whether *Spurr* v. *Hall* (2 Q. B. D. 615) was correctly decided.

APPEAL from a decision of the Exchequer Division, affirming an order of Field, J. (1)

(1) In the Exchequer Division.

April 15. *Shortt* for the plaintiff:—*Herschell, Q.C.*, and *R. V. Williams* for the defendant:—

HUDDLESTON, B. I have felt some hesitation in deciding this case; not indeed on the question whether payment into court ought to be allowed, together with a plea of fraud, for that I think would prejudice and embarrass the fair trial of the action, and I feel satisfied that upon that ground the order of Field, J., was right. But we must meet the other question, which is whether a defendant can now pay money into court together with a defence of the general issue. There are no provisions in the Judicature Acts or Rules, which specifically allow him to do so. Sect. 21 of the Judicature Act of 1875 provides that all forms and methods of procedure which are not inconsistent with the Acts or Rules are to continue as before. Therefore, if there were nothing more, the old rule would prevail that payment into court cannot be pleaded with the general issue. The practice as to payment into court in satisfaction is regulated by Order XXX. Rule 1 provides that, in any action to recover a debt or damages, the defendant may pay money into court by way of satisfaction or amends; and Rule 4 provides that the plaintiff may accept the same in satisfaction of the causes of action in respect of which it is paid in; and "in case the sum paid in is accepted in satisfaction of the *entire* cause of action," may tax his costs. In the present case the plaintiff must either accept the 130*l.* in satisfaction of his entire cause of action in which case he admits that he is entitled to no more; or he must prove the contract and breach, and that his damages are more than 130*l.* I think that places the plaintiff in some difficulty. Under Order XXVII, Rule 1, the Court or judge has power to strike out any matter in the pleadings, which "may be scandalous or may tend to

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Writ issued the 2nd of February, 1878.

Action to recover 5512*l.* 12*s.* 6*d.* alleged to be due to the plaintiff as commission upon orders received by the defendant from the Russian Government for machines, tools, fixtures, gauges, &c., for manufacturing the plaintiff's guns. The statement of defence was delivered on behalf of the defendant John Batley.

The pleadings, facts, and arguments are sufficiently stated in the judgment delivered by Thesiger, L.J.

May 8, 9. *Mellor, Q.C.*, and *J. S. Dugdale* (*Shortt* with them), for the plaintiff.

Herschell, Q.C., and *R. V. Williams*, for the defendant.

Cur. adv. vult.

July 2. The following judgments were read.

THESIGER, L.J. In this case, which was heard before Lords Justices Brett and Cotton and myself, I have to deliver the judgment of Lord Justice Brett and myself.

The plaintiff, by his statement of claim, alleges that he is the inventor of the Berdan rifle; that in the year 1869 he was in Russia and in communication with the Russian Government respecting the manufacture of his guns and rifles, and that the defendant's firm were endeavouring to obtain from the same government orders for the manufacturing and supplying to it of machines, &c., necessary for the making of the said guns and

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prejudice, embarrass, or delay the fair trial of the action."

Though the decision in *Spurr* v. *Hall* (2 Q. B. D. 615) proceeded on facts which are distinguishable from the present, I think it is to some extent an authority, and that we ought not to go in the teeth of it. The question ought to be determined by the Court of Appeal, which can review *Spurr* v. *Hall* (2 Q. B. D. 615) and its own decision in *Potter* v. *Home and Colonial Insurance Company* (cited 2 Q. B. D. 622) where the point now in question was not argued. I think, therefore, that the order of Field, J., ought to be upheld.

MANISTY, J. I have no doubt that a plea of fraud ought not to be pleaded together with payment into court. As to the point whether a defendant may deny the whole cause of action and pay money into court, I think that question is determined by the authority of *Spurr* v. *Hall*, (2 Q. B. D. 615) and that we ought to decide in accordance with it.

Appeal dismissed.

rifles, that, therefore, in consideration that the plaintiff would use his influence with the government to prevent an order being given to any parties for machines to make his guns in Tula (other than as excepted) until a person or commission visited England about the business, the defendant's firm, by a letter signed by one George Greenwood, then a member of the firm, agreed to pay a commission of 5 per cent. on all orders received through him, or directly from the Russian Government, for such machines, &c., as aforesaid, for three years from the date of the agreement; that the defendant received and executed such orders to a large amount; that all conditions precedent were performed necessary to entitle the plaintiff to recover the agreed commission, and concludes by claiming a sum of over 5000*l.*

The statement of defence, as originally delivered, denied that George Greenwood was ever a member of, or that he had any authority to bind the firm by the letter constituting the alleged agreement, or that his act in writing it was ever ratified or confirmed, or the offer thereby made ever assented to by the defendant, or that the plaintiff ever accepted such offer; and further alleged that if the agreement was made, the plaintiff never performed his part of it or used his influence with the Russian Government; that at the time of the agreement he knew that the government would not give any orders (other than those excepted) until a person or commission had visited England, and improperly and fraudulently suppressed that fact from George Greenwood. The defendant then put the plaintiff to the proof of the receipt or execution by him of any orders which were the subject of the agreement within three years from its date; alleged that the plaintiff's claim was barred by the Statute of Limitations; and that if the agreement was made he was induced to make it by the fraud of the plaintiff, and concluded by a payment into court made in these terms:—"Lest contrary to what the defendant believes and contends, he is under any liability to the plaintiff, he brings into court the sum of 130*l.*, and says that the said sum is enough to satisfy the plaintiff's claim in respect of the matters herein pleaded to."

The plaintiff objected to the payment into court, concurrently with the other defences to the same causes of action combined in

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the statement of defence. Mr. Justice Field, at chambers, made an order disallowing it, and the Exchequer Division upon appeal affirmed his order. The defendant thereupon appealed to this Court, but intimated at the same time his willingness to strike out of the statement of defence all the allegations of fraud, and when before us, by his counsel expressed the same willingness, and the case must be treated as if in point of fact, these allegations were struck out. That being so, two questions have been argued: the first, whether in any case, or in all cases under the Judicature Acts and Orders, a payment into court, at the same time that the cause of action in respect of which it is paid in is denied, should be allowed; the second, whether assuming such a payment to be in some but not in all cases proper, the present is one of those cases.

The first question is one of very great importance. The practice of judges at chambers, since the case of *Spurr* v. *Hall* (1) was decided, has been to disallow in all cases a payment into court, concurrent with paragraphs denying or traversing the cause of action in respect of which the payment is made, and in the present case, *Spurr* v. *Hall* (1) was treated in the Court below as an authority properly supporting that practice, although the learned judges expressly invited an appeal upon the point.

Payment of money into court originally existed in the shape of a rule to strike the sum paid in out of the damages, which rule it was necessary to prove at the trial. By the General Rules of Trinity Term 1 Vict., a plea of payment into court was substituted for the old practice. The question then arose, whether, inasmuch as the statute of 4 Anne, c. 16, s. 4, enabled a defendant, with leave of the Court, to plead as many several matters as he should think necessary for his defence, the plea of payment into court ought to be allowed, together with other pleas, to the same cause of action. A uniform practice thereupon sprang up, under which payment into court was only allowed to be pleaded, where the cause of action to, or in respect of, which it was made and pleaded, was not traversed, and was consequently admitted by the pleading. That practice was continued after the passing of the Common Law Procedure Act, 1852, s. 84, under which certain

(1) 2 Q. B. D. 615.

specified pleas (amongst which the plea of payment into court was not included), might be pleaded together without leave, while all pleas other than those specified had to be made the subject of leave of a judge, or of the court, if it was desired to join them with any other plea. The ground upon which this practice both before and after the Common Law Procedure Act, 1852, was based, was the inconsistency in the record, which, it was held, would arise if a plea of payment into court were joined with other defences to the same cause of action: see as bearing upon this point the cases *Key* v. *Thimbleby* (1); *Maclellan* v. *Howard* (2); *Jenkins* v. *Edwards.* (3)

In this state of circumstances, the Judicature Acts and Orders came into existence and swept away the old forms and practice of pleading, leaving it open to a defendant, as the general rule, to raise by his statement of defence without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in Rule 1, Order XXVII., which is in these terms: "The court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim, or defence, or reply, or may order to be struck out or amended, any matter in such statements respectively, which may be scandalous, or which may tend to prejudice, embarrass, or delay, the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties." As regards, however, payment of money into court, special provision is made by Order XXX., and the Court has to see first, whether there is anything in the rules comprised in the last-mentioned order, which precludes a defendant from paying money into court in respect of a cause of action, the existence of which he at the same time denies. This point has not been in terms taken in argument before us, and was not made the ground of the decision in the Court below, but it is involved in the argument, and it is desirable to consider it as introductory to the consideration of the point arising upon Rule 1 of Order XXVII. It is suggested that money is not paid into court by way of satisfaction or amends,

(1) 6 Ex. 692, 694. (2) 4 T. R. 194.
(3) 5 T. R. 97.

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within the meaning of Rule 1 of Order XXX., when it is paid into court in respect of a claim or cause of action, which the defendant does not admit to exist in fact. Such an argument does not, however, appear to us well founded. The sum paid in is (as has been admitted on the part of the defendant's counsel to be the effect in this action), absolutely appropriated to the purpose of satisfaction or amends. The plaintiff may obtain the payment of it out to himself in manner provided by the third Rule of the Order under consideration, and may, either under Rule 4, accept it in satisfaction of the causes of action in respect of which it is paid in, and if he accept it in satisfaction of the entire cause of action, may tax his costs and sign judgment for the costs so taxed; or, if he think proper, may go on with the action for the purpose of recovering something more, in which event the issue, quoad the defence of payment into court, will be the same as it was before the coming into operation of the Judicature Acts, although there will be other issues going to the same cause of action which the tribunal by which the action is tried will have to determine. We are of opinion, therefore, that there is nothing in the rules comprised under Order XXX., which precludes a defendant from taking the course under consideration.

The question then arises whether the payment into court necessarily tends "to prejudice, embarrass, or delay the fair trial of the action" within the meaning of Rule 1 of Order XXVII. Now in considering this question we are disposed to give a liberal interpretation to the words "fair trial of the action," and to hold that a pleading, which tends to prejudice, embarrass, or delay the plaintiff at any stage of the proceedings in the action, not merely so as to prevent him from fairly trying at the actual trial of the action, but so as to prevent him from ever trying on fair terms the real issue between him and the defendant, the obtaining of a decision upon which is the legitimate object of the action, would affect the "fair trial" of the action within the meaning of the rule; but giving this interpretation to the rule, we are of opinion that in general such a payment into court as that under consideration has not the effect referred to, and ought to be allowed. That it works no practical inconvenience and leads to no necessarily embarrassing inconsistency in the record will be seen by con-

sidering what, if this course be adopted, will be the practical result of the trial of the action.

If the plaintiff fail at the trial to establish his causes of action, the judgment will be properly a general one for the defendant, for if there be no cause of action, it follows that the plaintiff cannot be entitled to recover anything more than that which the defendant has paid into court, and really ought not to have received any money at all. The record, therefore, only shews that the plaintiff has obtained, through the timidity of the defendant, something which he had no right to obtain. On the other hand, if the plaintiff establishes his cause of action and proves that the sum paid into court is not sufficient, or that he is entitled to some relief, such, for instance, as injunction, other than or over and above relief in damages, the judgment will be a general one for him. The only remaining alternative is that of the plaintiff succeeding in establishing his cause of action but failing to prove any damage beyond the sum paid into court, or to establish any title to relief other than in damages. In that event the issues upon the record will be duly found in accordance with the event, and will sufficiently explain themselves; the general judgment will be for the defendant, and unless the judge otherwise orders, pursuant to Rule 1, Order LV., the defendant will recover the general costs of the cause, while the plaintiff will be entitled to the costs of the particular issues found in his favour. Is there, then, anything inherently unjust in a defendant paying money into court in respect of a cause of action, which at the same time he by his pleadings denies to exist? As a general proposition we should answer nothing, while there is much to be said in favour of it. Is it just in principle as regards a defendant, who considers that he has a good defence on the merits, but who is desirous, if possible, of terminating litigation by a payment of money, that he should be forbidden to adopt this prudent course, except under the penalty of a complete admission of a cause of action which he honestly disputes, and with the consequent risk which would attend the trial of the action if the sole issue were as to the sufficiency of the amount paid in? On the other hand what is it, if such a course be taken, of which the plaintiff has to complain? In the great majority of actions, whether of contract or tort, it can hardly

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be suggested that he is in any more embarrassing predicament than that in which he would be placed in an ordinary case of a simple plea of payment into court, or in a case where inconsistent pleas, not including a plea of payment into court, are pleaded. In the latter case he must be prepared to meet the alternative defences, in the former he must judge whether it is advisable to proceed with the action at all. The combination of the plea of payment into court with other defences throws no burden greater in kind upon the plaintiff, although in degree it may somewhat enhance the difficulty of his position in regard to the course it is advisable for him to pursue.

It may, however, possibly be that in some actions brought to try a right of or in respect of property which is denied, or to establish character which has been assailed, and in actions where the plaintiff is by the statement of defence charged with fraud, and perhaps in some other cases it would be, as a matter of practice, improper to allow the defence of payment into court concurrently with other defences. It is not necessary for us to decide this point or to say whether, upon the case presented to the Queen's Bench Division in *Spurr* v. *Hall* (1), the decision arrived at was a proper one; but we wish to guard ourselves against being supposed to decide that, even in such actions as those to which we have alluded, the payment into court should not be allowed, and we may add that if in some actions the payment into court may tend to prejudice, embarrass, or delay the fair trial of the action, within the meaning of Order XXVII., Rule 1, the circumstances must at least be of a very special character to justify the courts in holding that a defendant is precluded from adopting a course which it is, as a general proposition, his legal right to adopt. In the present case, with the allegations of fraud withdrawn, the defence amounts to no more than the defendant's saying this: "I deny the existence of any contract between me and the plaintiff, or that, if a contract ever existed, any claim has properly arisen against me in respect of it. I allege that the Statute of Limitations is a bar to the action: but I am content to pay in any event a sum of 130*l.* in respect of any claim which might possibly be established against me; if that sum be accepted as sufficient, the

(1) 2 Q. B. D. 615.

litigation will terminate, but if not, then I will fall back upon my other defences, and the question of the sufficiency of what I have paid will only form one of my defences." What is there in such a course which tends "to prejudice, embarrass, or delay the fair trial of the action?" We think, nothing. To the lawyer's mind there is, no doubt, at first sight something anomalous in payment by way of satisfaction or amends in respect of a cause of action, the existence of which the defendant by his pleading denies; but the more we have considered the point, the stronger has become our conviction that there is nothing unreasonable or unjust, and nothing contrary to the letter or spirit of the Judicature Acts or Orders, in a defendant so acting; and we think that, apart from anything in the Judicature Acts or Orders to compel us to do so, no predilection in favour of the old theories of consistent records should induce us to preclude defendants in actions from saying and doing that which, as practical men, before the action they might reasonably say and do, namely, say that they entirely deny a person's right to sue them, yet pay, or offer to pay, a sum of money as the price of peace and for the prevention of further litigation.

For these reasons we think that the appeal should be allowed, and the order of the Court below reversed.

COTTON, L.J. The only question which we have to decide on this appeal is, whether the 11th paragraph of the statement of defence ought, under Order XXVII., Rule 1, to be struck out as tending "to prejudice, embarrass, or delay the fair trial of the action." I agree in the judgment of Lord Justice Thesiger that it ought not, even if this paragraph is to be considered as technically a plea of payment into court. But for the purposes of this judgment, I think it not necessary to hold that this is a plea of payment into court, within the 71st section of the Common Law Procedure Act, 1852. My opinion is that it is not; and I think it right so to state, because the question may hereafter arise whether if the plaintiff should proceed with this action, and, though he establish the right claimed by him in his action, should fail to prove damages beyond the sum paid into court, the defendant will be entitled to judgment and the costs of the action. Under the old form of pleading it was necessary that each plea

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should state only one ground of defence, and the plea of payment into court contemplated by the Common Law Procedure Act, 1852, necessarily was an admission on the record of the plaintiff's right on which the action was founded. But the 11th paragraph of the statement of defence states that the defendant does not admit any right on the part of the plaintiff. It is in substance this: "I do not admit that you have any claim against me, but for the sake of peace I am willing to pay you the sum which I have paid into court. If you do not take that in satisfaction, I shall contest not only the amount of damages but your right to bring any action." On such a statement being made the plaintiff must consider what the object of his action is, whether it is to establish a right or to obtain damages; and if the latter, whether it is probable that the amount offered is as much as he will probably obtain in the action. On the trial of the action, if the plaintiff establish his right in respect of which he sues, and the judge is satisfied that the action was brought to try a right, he may make a declaration establishing the plaintiff's right and give him costs, except those of any unsuccessful attempt to prove damages beyond the amount paid into court.

In this view of the defence, as the allegation of fraud has been withdrawn, I am of opinion that the paragraph in question cannot be considered as in any way tending "to prejudice, embarrass, or delay the fair trial of the action;" but there may be special cases in which this would be the effect, as in actions for libel, which the defendant by his statement of defence justifies. All I decide is that a statement of payment into court cannot be struck out because the defendant does not admit the plaintiff's right of action.

Appeal allowed.

Solicitors for plaintiff: *Whateley, Milward, & Whitehead, for Whateley, Milward, Balden, & Lee, Birmingham.*

Solicitors for defendants: *Van Sandau & Cumming, for Brook, Freeman, & Batley, Huddersfield.*

FIELD *v.* THE GREAT NORTHERN RAILWAY COMPANY. 1878 *July* 16.

Practice—Costs to "follow the event"—Costs of former Trial where new Trial had—Judicature Act, 1875, *Order LV.*

The event mentioned in Order LV. is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation.

The plaintiff in an action recovered a verdict. The Court ordered a new trial, unless the plaintiff should consent to certain terms, but gave no direction as to costs. The plaintiff did not consent, and a new trial was had, when a verdict was entered for the plaintiff:—

Held, that the plaintiff was entitled to the costs of the first trial, as part of the costs of the action which, under Order LV., follow the event.

THIS was an action for personal injuries, in which the plaintiff recovered 750*l.* as damages. A rule was obtained by the defendants in the Exchequer Division for a new trial, on the ground that the damages were excessive. The Court ordered the rule to be made absolute, unless the plaintiff should consent to reduce the damages to 375*l.* No order was made as to costs.

The plaintiff refused to accept the reduced amount, and a second trial was had, when verdict and judgment were entered for the plaintiff by consent for 490*l.*

On taxation, the master refused to tax the costs of the first trial, and only allowed the plaintiff the costs of the rule and the second trial, and his decision was affirmed on appeal by the judge at chambers.

Bigham, for the plaintiff, moved to review the taxation. He cited *Creen* v. *Wright* (1), and referred to Order LV. of the Rules of Court.

F. M. White, Q.C., for the defendants, contrà. The old practice as to costs has not been expressly abolished, and therefore it remains in force, as is shewn by s. 21 of the Judicature Act, 1875, and the note at the head of the Rules of Court. Therefore, as no direction was given as to costs when the rule for the new trial was granted, the costs of the first trial must be considered to be thrown away, pursuant to the practice of Rule 54 of the Regulæ Generales of Hilary Term, 1853. It has been the practice to grant new trials on conditions, such as on the payment of the costs of the

(1) 2 C. P. D. 354.

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former trial, and in the absence of any condition these costs cannot be made costs against the defendants.

Here the first trial was an abortive trial; the verdict has been set aside; it must therefore be treated as if it had never been given, so that there was no event at all in that trial, and each party must pay his own costs. Or the first trial may be considered as analogous to an unsuccessful interlocutory application, and then the plaintiff's costs would not be made costs against the defendants.

KELLY, C.B. I am of opinion that the plaintiff is entitled to the costs of the former trial. This case is governed by Order LV., which seems to me to be clear and express, and we have only to consider what is the "event" in this case. It has been argued that the first trial was null and void, and had no event at all, and therefore that the costs of that trial are thrown away. I, however, think that the event which the costs follow is the conclusion of the whole matter or proceeding which commenced with the writ of summons and ended with the final judgment, and that the party who succeeds in his action is, in the absence of any special directions or orders, entitled to the whole costs of the entire action. I am clearly of opinion that this is the meaning of Order LV., and I find that the case of *Creen* v. *Wright* (1) is an authority on this very point. The facts of the case now before us are more favourable to the plaintiff than were the facts in that case, as there the plaintiff was nonsuited on the first trial, whereas here he obtained a verdict on both occasions, so that he was in the right throughout.

I entirely agree with the decision in *Creen* v. *Wright* (1), and I think that the plaintiff is fully entitled, both on principle and on authority, to all his costs of both trials.

MELLOR, J. I am of the same opinion. Both Order LV. and the case of *Creen* v. *Wright* (1) are clear and conclusive. All the complications which formerly existed are cleared away, and one plain rule now governs all these cases. The costs are to follow the event, and the event is the result of the entire litigation. In this case the first trial was not like an interlocutory application.

(1) 2 C. P. D. 354.

nor was it an abortive issue; it was one of the stages in the whole proceeding, which ended in the judgment in favour of the plaintiff. The plaintiff is therefore entitled to the natural consequences of his judgment, and they include the costs of the whole case. All the proceedings here were but stages of one litigation, which has finally ended in a verdict in favour of the plaintiff.

Order absolute to review taxation.

Solicitors for plaintiff: *Chester & Co.*
Solicitors for defendants: *Nelson, Barr, & Nelson.*

[IN THE COURT OF APPEAL.]

May 18.

BEYNON & CO. *v.* GODDEN & SON.
H. R. EVANS, THIRD PARTY.

Ship and Shipping—Charterparty—Freight—Ship's Husband.

The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer and not in the nature of a charge on the freight; and therefore if he is removed from his office by the owners before he is in a position to receive the freight, an assignee of his interest in the freight cannot maintain a claim to it as against the owners.

When an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of her voyage; but where the mortgagor of certain shares is ship's husband, if the mortgagees join with the owners of the other shares in the ship in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight.

In August, 1876, R. was mortgagor of certain shares in a vessel, and also was acting as ship's husband, and the defendants were charterers of the vessel for the voyage upon which she was then employed. R. obtained from the plaintiffs a loan of 200*l.*, and by a letter dated the 30th of August requested the defendants to pay to the plaintiffs the freight due on the charter. On the 20th of September the mortgagees of R.'s shares and the owners of the other shares appointed E. ship's husband in place of R. Upon the 11th of October the vessel completed her voyage, and upon the 14th began to discharge her cargo; upon the 16th the defendants sent to the plaintiffs a cheque for 200*l.*, which they afterwards dishonoured, E. having claimed the amount of the freight:—

Held, affirming the judgment of Huddleston, B., that the plaintiffs could not maintain an action to recover the amount of the cheque.

ACTION to recover the amount of a cheque.

The facts, course of the trial, and the arguments are sufficiently stated in the judgment of the Court.

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March 1, 4, 5. *J. J. Powell, Q.C.*, and *Watkin Williams, Q.C.*, for the plaintiffs, cited, as to the title of the holder of a negotiable security assigned to him for a pre-existing debt: *Misa* v. *Currie.* (1)

Pollard and *Bosanquet*, for the defendants, cited, as to the right of a ship's husband (2) to assign the freight, *Guion* v. *Trask* (3); as to the title of the assignee of freight claiming through a part-owner against the co-owners: *Lindsay* v. *Gibbs* (4); as to the priority of a maritime lien over the claim of a mortgagee: *The Mary Ann* (5); *The Feronia* (6); as to the rights of a mortgagee of a ship upon taking possession: *Brown* v. *Tanner* (7); *Rusden* v. *Pope* (8); *Wilson* v. *Wilson.* (9)

H. Matthews, Q.C., and *A. T. Lawrence*, for *H. R. Evans.*

Watkin Williams, Q.C., replied.

Cur. adv. vult.

May 18. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was read by

BRAMWELL, L.J. This is an action to recover the amount of a cheque given by the defendants Godden to the plaintiffs. The judgment has been for the defendants, and against this the plaintiffs have appealed. The following are the transactions which gave rise to the plaintiffs' claim.

In August, 1876, T. R. Rees was part-owner of a vessel, the *Eliza*, and he was also acting as the ship's husband. In August he was in want of money, but even assuming, as alleged by the plaintiffs, that he required it for the purposes of ships of which the ownership was the same as that of the *Eliza*, he did not require it for the purpose of earning the freight to be earned by the voyage on which the *Eliza* was then engaged. He applied to the plaintiffs for a loan, and it appears on the evidence of the plaintiff Thomas Beynon, that before he made any advance Rees

(1) 1 App. Cas. 554.

(2) As to the office and authority of a ship's husband see Abbott on Merchant Ships and Seamen, part i. ch. iii. sec. 4, p. 79 (11th ed.), and MacLachlan on Merchant Shipping, ch. iv. p. 173 (2nd ed.)

(3) 1 D. G. F. & J. 373; 29 L. J. (Ch.) 337.

(4) 22 Beav. 522.

(5) Law Rep. 1 A. & E. 8.

(6) Law Rep. 2 A. & E. 65.

(7) Law Rep. 3 Ch. 597.

(8) Law Rep. 3 Ex. 269.

(9) Law Rep. 14 Eq. 32.

stated to him that the ship was in debt to him, Rees, to the extent of 280*l.* The defendants had chartered the ship for the voyage in which she was at the time employed; and on the 30th of August, 1876, the plaintiffs advanced to Rees 200*l.*, and he thereupon signed and gave to the plaintiffs a letter addressed to the defendants, which was dated the 30th of August, 1876, and was as follows:

"Newport, Mon., August 30, 1876.

"Messrs. Wm. Godden & Sons, London,

"Gentlemen,—I hereby give authority, and request that you will pay to Messrs. T. Beynon & Co., of Newport, Mon., the freight on charter of my vessel the *Eliza* dated August 2nd, 1876, bound from Little Curaçoa (W. I.) to U. K. or Continent, in consideration of value received from them."

On the 6th of September this letter was communicated to the defendants Godden, and this letter constitutes a good equitable assignment to the plaintiffs of the freight payable by the defendants, if and so far as Rees was able to assign this freight. The *Eliza* on the 11th of October arrived at Harburgh and completed the voyage for which she was chartered by the defendants, and on the 14th began to unload her cargo. At the time when Rees gave the equitable assignment of the 30th of August, his share of the *Eliza* was in mortgage, and on the 20th of September the mortgagees of his share, and the owners of the other shares, appointed Henry Russell Evans ship's husband in the place of Rees. There was some question whether this appointment was proved at the trial of the action, but on the whole we think that if not proved it was assumed to be the fact that Russell Evans had been so appointed. The *Eliza* began to discharge her cargo on the 14th of October, and on the 16th of that month the defendants, who had previously had some communication with Moyle, their agent at Harburgh, where the vessel was unloading, on the subject of making a payment to the plaintiffs, gave to them a cheque for 200*l.* On the same 16th of October Evans sent a telegram to Harburgh, by which he claimed as registering managing owner of the *Eliza* to be entitled to the freight, and thereupon Moyle telegraphed to the defendants who stopped payment of the cheque given to the plaintiffs, and the action is brought to

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recover the amount with interest. The defendants after the commencement of the action insisted that Russell Evans should be made a party to the action, on the ground that they, if liable to the plaintiffs, were entitled to relief over as against him.

The action was tried at Gloucester before Baron Huddleston without a jury. He decided in favour of the defendants, but he ordered them to pay the costs of Evans, and also gave the plaintiffs against the defendants any costs which they had incurred in consequence of Evans having been summoned as a third party. The plaintiffs have appealed and asked that judgment may be given for them, or that a new trial may be directed, and the defendants have also appealed against the direction that they should pay the costs incurred by summoning Evans as a third party.

The right of the plaintiffs must depend on the question, whether at the time when the cheque was given, they were entitled to receive the freight of the *Eliza* either absolutely or to the extent of 200*l.*

Under the charterparty one-third of the freight was payable on arrival at the port of discharge, and it was argued on behalf of the plaintiffs, that Messrs. Matthiessen & Co., of Harburg, had by their directions and on their account paid sums of money exceeding 200*l.* for the expenses of the ship there, and that consequently the plaintiffs were entitled to the extent of these payments to receive the portion of the freight payable at Harburg. But it appears that these payments were made on account of the defendants as charterers, and were repaid by them to Messrs. Matthiessen.

Had, then, Rees power to assign the freight of the *Eliza?* At the time of obtaining the advance from the plaintiffs he was ship's husband; but as such, in our opinion, he had no power as against his co-owners to assign or pledge the entire freight. Apparently the plaintiffs made the advance to him on his representation that the money was owing to him as ship's husband by his co-owners; and if this was the fact, and he as ship's husband had received the freight, the co-owners must have allowed him in account the sums due to him before they could have claimed their shares of the freight, and he could have assigned to the plaintiffs this his interest therein. But this interest is a right of lien or retainer,

and not in the nature of a charge on the freight, and as he was removed from being ship's husband by the act of the mortgagees and of the co-owners before he was in a position to receive any part of the freight, the plaintiffs cannot, even if there were a balance due to Rees, claim by virtue of his assignment to receive the freight.

An attempt was made to shew that the co-owners of the *Eliza* had given Rees at least implied authority to borrow money on security of the freight; but in our opinion the evidence does not support this contention.

The result, in our opinion, is that Rees had no power to assign the entire freight. But the question still remains whether Rees could assign his own share of the net freight, that is, of the freight remaining after paying all expenses connected with the voyage. At the trial there was no evidence that there was such a balance; but we might receive evidence now or direct an inquiry for the purpose of ascertaining whether there was any such balance of freight; but in our opinion the plaintiffs cannot under the circumstances sustain any claim even to Rees' share of the net freight. For Rees' share was in mortgage, and in our opinion the mortgagees effectually interfered, so as to entitle themselves to Rees' share of the freight, as against him and the plaintiffs as his assignees. If the entire ship had been in mortgage, to defeat the right of the mortgagor to receive the freight, it would have been necessary to establish that the mortgagee had taken possession of the ship before she completed her voyage. But the mortgage was of certain shares only in the ship, so that the mortgagees were not in a position to take possession of the ship, and in our opinion the mortgagees, by joining with the owners of the other shares in the ship in the appointment of a ship's husband in the place of Rees, which they did before the ship reached Harburgh, effectually intervened so as to entitle themselves to the freight to be earned, and to displace the title thereto of Rees and of his assigns. The plaintiffs' appeal entirely fails, and must be dismissed with costs.

There remains the appeal of the defendants. In our opinion this appeal fails. As far as appears, Russell Evans did not receive the freight or any part of it. All that he did, was as agent of other parties to give the defendants directions not to pay the

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freight to the plaintiffs. It was for them to decide whether they would act on these directions or not, and there was no sufficient reason for summoning Russell Evans as a third party.

Judgment affirmed.

Solicitors for plaintiffs: *Thomas White & Sons, for J. D. Pain & Son, Newport, Monmouthshire.*

Solicitors for defendants: *Cowdell, Grundy, & Browne.*

Solicitors for H. R. Evans: *Stocken & Jupp.*

June 18.

HARRIS AND ANOTHER *v.* MOBBS.

Nuisance—Van left on Roadside—Obstruction of Highway—Fright of Horses—Development of Vice thereby—Kicking Horse—Damage to Driver—Proximate cause of.

A house-van attached to a steam-plough was left for the night on the grassy side of a highway by the defendant. The van and plough were four or five feet from the metalled part of the way. During the evening the plaintiffs' testator drove his mare in a cart along the metalled road. The mare was a kicker, but he was unaware of her vice. Passing the van she shied at it, kicked, and galloped kicking for 140 yards, then got her leg over the shaft, fell, and kicked her driver as he rolled out of the cart. He afterwards died from the kick so received.

In an action under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 1), by his executors for wrongful and negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably, and negligently, and caused some appreciable danger to vehicles passing along the metalled parts of the road; that the death was occasioned by the van standing where it did, and by the inherent vice of the mare combined, and that there was no contributory negligence:—

Held, that on these findings the verdict and judgment must be for the plaintiffs; for the unauthorized, unreasonable, and dangerous user of the highway by the defendant was the proximate cause of the injury.

IN this action, tried at Oxford spring assizes, 1878, before Denman, J., and a special jury,

J. J. Powell, Q.C., and *A. T. Lawrence*, moved to enter judgment for the plaintiffs.

H. Matthews, Q.C., and *Bosanquet*, shewed cause.

Cur. adv. vult.

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The pleadings, facts, findings, and arguments are stated in the following judgment:—

June 18. DENMAN, J. This was an action brought by the plaintiffs as executors of one James Harris, under Lord Campbell's Act. The defendant was the owner of a steam-plough, which travelled about the country drawn by a steam-engine, and which also had attached to it a house-van. The cause of action alleged in the statement of claim was that the defendant so wrongfully and negligently obstructed the highway by placing and leaving thereon a large house-van, with ploughing gear attached, that the deceased was hindered and prevented in his user of the highway, and his mare was frightened and rendered unmanageable, and his cart damaged, and he received serious injuries in the knee, of which he died. The defendant denied that he obstructed the highway, and that the injuries happened through any obstruction, or in consequence of the van being drawn up at the side of the highway, but alleged that the horse became unmanageable at a considerable distance from the house-van, and after the deceased had driven safely by the said van, and that the mare, which was vicious, kicked and upset the cart in which the deceased was driving. At the trial it appeared that the house-van in question was placed on some grass at the side of the metalled part of the line of road. It had been placed there early in the afternoon, and was still there when the accident happened between 7 and 8 P.M., on the 27th of September, being engaged to work in an adjoining field on the following morning. The engine had been taken elsewhere, but the plough remained attached. The persons in charge of the van and plough had made no attempt to take them into the field, which they explained by stating that the ground was in a slippery state, not favourable for such an operation, and that from their experience they knew that it would have been impossible to get it in on that night. This view, however, did not satisfy the jury, as appears from the answers to the questions put. Several witnesses were called who proved that on the same afternoon they had driven along the same road, and that their horses had shied and swerved considerably at the house-van, standing in the same spot, but no accident had happened in consequence. There was a strong body of evidence for the defendant, to shew

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that the mare was a confirmed kicker, and some evidence to the effect that the deceased must have known of the habit. The finding of the jury, however, must I think be taken to absolve the deceased from any knowledge that the mare was a dangerous one to drive. The evidence for the defendant was also directed to an attempt to prove that the deceased was guilty of negligence in his treatment of the mare at the time she shied; but the finding of the jury disposes of this point. The house-van stood between four and five feet from the metalled part of the road. There was very little difference between the accounts given by the witnesses on both sides of the occurrence itself. The mare appears to have shied immediately opposite to the van, away from the van, towards the off-side of the road, and to have swerved continually to the right until she got the off-wheel on the footpath, and to have begun kicking while galloping on so violently as to kick the dash-board to pieces, and finally to have got her leg over the shaft, when she fell, and the deceased rolled out of the cart, which was not itself upset, and he was kicked in the knee by the mare so badly that about seven weeks afterwards he died from erysipelas occasioned by the injury. The witnesses all agreed that the distance of the place where she fell from the van was about 140 yards.

Such being the evidence so far as it was adopted by the jury, it was contended by Mr. Matthews for the defendant that the action would not lie on the following grounds:—

First, that,—though he admitted that the grass upon which the van and plough stood was a part of the highway, and though it standing there might constitute an obstruction so that if a horseman, or even the driver of a vehicle, wishing to use that part of the highway had been obstructed and injured, an action might lie,—still in the present case no action would lie because there had been no obstruction, in fact, of the deceased, and no more danger caused by the van or plough than would have been occasioned by the same objects passing along the highway drawn by horse-power as they lawfully might have been. It was also contended that the accident had happened wholly or in part by reason of inherent vice in the mare herself, and that it was not the necessary or natural result of being frightened that the mare should kick violently and destroy the vehicle it was drawing. The jury in

answer to questions put by me found, that the van was left standing where it stood (1) unreasonably, and (2) negligently "considering that no effort had been made to place it in the field." In answer to question (3), "Was it dangerous to vehicles passing along the metalled part of the road?" They found "not more so than if the same van had been in motion travelling along the road with horse-power." I requested them if possible to answer the question "aye" or "no," and after a second retirement to consider that question, they answered, "There was some appreciable danger in leaving it standing there. That is the only unanimous answer we can give." The 4th question put to the jury was as follows: "Was the death of the deceased occasioned by the van standing where it did? Or was it a mere accident? Or was it due to negligence of the deceased in his management of the mare? Or to inherent vice of the mare? Or to any two or more of these causes, or to all combined?" The jury answered, "To all combined, except negligence of the deceased and mere accident;" and, in answer to a further question, they said that they meant to find that it was due to the van being where it was, and to the inherent vice of the mare combined. Fifthly. They found that there was no contributory negligence in the deceased; and they assessed the damages at 250*l.*, one-third for the widow, and two-thirds for the children. I reserved the case for further consideration, and it was argued before me during the last sittings. The first point insisted upon was that no action would lie for an obstruction of the highway, where the person alleged to be obstructed had been using a different part of the highway, viz., the metalled part of the road, and that there was no instance to be found in the books of an action for damage caused by an obstruction to a highway, where the obstruction consisted merely of some occupation of the ground likely to cause terror to horses passing along the highway.

It is true that there is an absence of express authority upon this point; but I think that it follows from cases which have been decided, that if there be an act done upon any part of the highway which is not a part of the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an

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action will lie for such damage. It has been held that the occupation of one side of a public street for several hours at a time, so as to prevent any carriage from passing on that side of the street, although room was left for two carriages to pass on the opposite side, is an indictable nuisance: *Rex* v. *Russell* (1); from which case, and from the case of *Reg.* v. *Cross* (2), it appears that the real question in such cases is whether the highway has been obstructed for an unreasonable time and in an unreasonable manner, or, in other words, in such a way as to amount to something beyond a fair and reasonable use of the way. The jury in the present case have found that the van in question was unreasonably left where it was at the time of the accident, by which I understand that it was not a fair and reasonable use of that part of the highway with reference to the rights of others. They have also found that it was appreciably dangerous, by which I understand that it was in their opinion likely to cause horses to shy or take fright in passing along the metalled part of the road. This finding was qualified by the addition "but not more so than if the same van had been in motion travelling along the road with horse-power." On consideration, I do not think this supposed qualification material. In the first place it leaves open the question whether, even if the van in question had been travelling along the high road drawn by horses with the plough attached, it might not, in the opinion of the jury, have been deemed to be a nuisance. I am not at all sure, indeed, that in that case, upon the same findings, it would not have been the duty of a judge to enter the verdict for the plaintiffs: see *Watkins* v. *Reddin*, per Erle, C.J. (3); but, at all events, I think it clear that the question whether it would or would not have been a nuisance in that case is a totally different question from that which arises in the present case, for it might be quite reasonable to convey such machines along the road from point to point, and yet wholly unreasonable to increase the danger caused by them by leaving them all day and night on the high road, or closely adjoining to it. I cannot agree with the view submitted by the defendant's counsel that there must be an injury caused by an actual physical obstruction

(1) 6 East, 427. (2) 3 Camp. 224.
(3) 2 F. & F. 629, at p. 634.

before an action will lie. Suppose a man were to occupy the grassy side of a highway with three or four cannon, and to keep firing them from morning to night, so as to terrify the horses passing along the metalled part of the road, I cannot doubt that he would be liable for the consequences, and that he would have wrongfully hindered and prevented in the user of the highway any one whose horse might have been frightened by such conduct. I do not think that it could, in such a case, be said that the right of passage had not been obstructed, or at least hindered and prevented, merely because the horse in question had not come into actual collision with the cannons, or merely because the cannons were not on that part of the highway along which the horse was travelling. It appears to me to follow, from the above considerations, that the plaintiff is entitled to the verdict and to judgment, so far as the above point is concerned, on the ground that the jury have, in effect, found that there was an unreasonable and dangerous occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which was unreasonable. The jury also found that there was negligence in placing and leaving the van and plough where they were, on the ground that there was no attempt to place it in the field. I am not quite sure whether the jury intended to find negligence with reference to the probable danger of leaving the van where it was, owing to the fact that they were unwilling to return any verdict expressly in favour of plaintiff or defendant, and they afterwards qualified their finding as to danger by the word "appreciable," as I surmise, from an inability to agree upon the question of negligence with reference to anything except making no attempt to get the van and plough into the field. I should, therefore, not feel myself justified in entering the verdict for the plaintiff upon the finding of negligence alone; and I abstain from further dealing with that part of the case.

I now come to that part of the case which has appeared to me to be the most difficult. It was, I think, clearly made out at the trial that the mare which the deceased was driving was a vicious mare, in the sense that she was a kicker. It must, however, be taken that the jury negatived any knowledge in the deceased of this habit, such as would have rendered it negligent in him to

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drive the mare. Contributory negligence on any other ground was negatived. The immediate cause of the accident was clearly that the mare in kicking got her leg over the shaft which caused her to fall, and in falling, the deceased received the kick which ultimately caused his death. The jury found that the accident was due to the van being there (which must be taken to mean "to the van being unreasonably left on that part of the highway so as to cause some danger to vehicles passing by"), combined with the vice of the mare. I understood this finding to mean that the accident would not have happened but for both these causes combined—an unreasonable and dangerous user by the defendants of that part of the road by their van and plough so as to cause danger to vehicles passing by—and an exceptionally dangerous animal shying, and running away from fright at the van and ploughs and then kicking the vehicle whether from fright or vice, the kicking being an exceptional vice in the mare. This finding must also, if possible, be reconciled with the other finding that the accident was not a mere accident, which was explained to the jury as meaning one for which no one was to be fairly considered to blame.

The plaintiffs' counsel argued that inasmuch as the defendant was guilty of an unauthorized and dangerous act in derogation of the public rights by which the mare had been frightened, this must be taken to be the only material cause of the mischief, the deceased being guilty of no wrong at all, and the whole transaction being one flowing directly from the alarm caused by the defendant's unauthorized act.

On the other hand, it was contended that the causa proxima of the injury was the kicking of the mare, which was not a necessary or natural consequence either of the shying or of the running away, so that although it might be true that in some sense the van and plough being there, led to the accident, it was not true that their being there was material to the accident, or caused it, in such a sense so to make the defendant responsible for it.

Though not without considerable hesitation, I have come to the conclusion that the plaintiffs are entitled to have the verdict and judgment entered for them. Looking at the undisputed facts in the case, I think it is clear that though the immediate cause of

the accident was the kicking of the mare, still the unauthorized and dangerous appearance of the van and plough on the side of the highway was within the meaning of the law the proximate cause of the accident. It cannot I think be laid down that no one is entitled to recover damages for an injury caused by a kicking horse in the absence of any knowledge on his part that it is such. In the present case it must be taken that the deceased was not aware that the horse was a kicker. Then was the kicking which caused the death a natural and necessary consequence of the act complained of? I think upon the whole that it was. The van was there, and it in fact frightened the deceased's mare so that she shied and swerved to run away, and having got one wheel on the footpath kicked violently, and within 150 yards fell and injured the deceased so that he died. The whole transaction is within a few seconds, and originates in the fright of the mare caused by the van. I think it cannot be laid down as having been the duty of the deceased to abstain from driving the mare. On the other hand, it cannot be laid down as the right of the defendant to assume that no nervous or runaway or kicking horse would come along the highway. It is only in the case of horses liable to be frightened that any danger exists, and where a horse has once been frightened by a dangerous apparition unlawfully placed on the highway, running away and kicking can hardly be considered to be unusual or unnatural consequences of the fright. The wrongdoer has no right to lay down the measure of his own wrong, or to limit the free use of the highway to horses which shall only shy when frightened and do no further mischief. On the whole, I think that the finding of the jury only amounts to this, that the accident was caused by the van, but that if the horse had not been a kicker it would not have happened. Looking at the finding and the facts together, I come to the conclusion that the plaintiffs were entitled to the verdict. I therefore direct it to be entered for them for the amount assessed by the jury, and give judgment for that amount with costs.

Verdict and judgment for the plaintiffs.

Solicitor for plaintiffs: *Walliner.*

Solicitors for defendant: *Field, Roscoe, & Co.*

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Feb. 28.

[IN THE COURT OF APPEAL.]

THE ATTORNEY GENERAL *v.* MOORE.

Statutes—Interpretation—Penalties—Municipal Corporations Act (5 & 6 *Wm.* 4, *c.* 76), *s.* 126—3 & 4 *Vict. c.* 97, *s.* 16—*Leges posteriores priores contrarias abrogant.*

Sect. 126 of the Municipal Corporations Act provided that when by any Act any penalties or forfeitures should thereafter be made recoverable in a summary way before any justices of the peace and by such Act the same should be made payable to His Majesty, in every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace should be holden, should be adjudged to be paid to the treasurer of the borough to the credit of the borough fund.

A subsequent Act, 3 & 4 Vict. c. 97, enacted, by s. 16, that certain offenders might be taken before a justice of the peace and convicted summarily, and should thereupon forfeit to Her Majesty a sum not exceeding 5*l*..

An offender having been convicted under the last-mentioned Act, before justices in a borough having a separate court of quarter sessions, was sentenced to pay a fine:—

Held, affirming the judgment of the Exchequer Division, that the provisions of the Municipal Corporations Act must be read as incorporated in the subsequent Act, and that the fine was therefore payable to the borough treasurer.

This was a special case stated by consent in a proceeding upon the revenue side of this division, instituted by the Attorney General against the defendant as clerk to the justices of the borough of Warwick, to recover a sum of 1*l*. 10*s*., being fines received by the defendant as such clerk, and alleged to be payable to Her Majesty.

1. The borough of Warwick is one of the boroughs mentioned in schedule A of 5 & 6 Wm. 4, c. 76, as having a commission of the peace. It has also a separate court of quarter sessions. The defendant is clerk to the justices of the peace of the borough.

3. In May, 1876, Amos Dalton was convicted, before two of the justices of the peace of the borough, of a breach of 3 & 4 Vict. c. 97, s. 16, for that he did unlawfully and wilfully obstruct and impede one Robert Billington, then being in the execution of his duty on the Great Western Railway, and was adjudged for this offence to forfeit and pay the sum of 5*s*., to be paid and applied according to law.

4. In September, 1876, John Reeves was convicted before two of the justices of the peace of the said borough of a similar breach of the same statute, and adjudged to forfeit and pay the sum of 1*l.* 5*s.*, to be paid and applied according to law.

5. The fines were received by the defendant.

6. Subsequently the Lords Commissioners of Her Majesty's Treasury claimed that the fines were payable to the Consolidated Fund, and ought to be paid over by the defendant to the receiver of fines.

7. The defendant has declined so to pay over the fines, or either of them.

8. It is contended on behalf of Her Majesty that upon the right construction of the statute 3 & 4 Vict. c. 97, s. 16 (1), the fines ought to be paid to Her Majesty. The defendant contends that upon the right construction of 5 & 6 Wm. 4, c. 76, s. 126 (2),

(1) 5 & 6 Wm. 4, c. 76, s. 126, enacts that "when by any Act any penalties or forfeitures are or shall hereafter be made recoverable in a summary manner before any justice or justices of the peace, and by such Act respectively the same are or shall be limited and made payable to His Majesty, or to any body corporate, or to any person whomsoever, save and except the informer, who shall sue for the same, or any party aggrieved, in every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace shall be holden as aforesaid, shall, notwithstanding anything in such Act respectively contained, be recovered for and adjudged to be paid to the treasurer of such borough for the time being, to the credit and on account of the borough fund of such borough; and no such penalty or forfeiture, or share of such penalty or forfeiture, shall in any case be recovered by or adjudged to be paid to any other person than the said treasurer, unless such person be the informer or the party aggrieved: Provided always, that nothing herein contained shall extend to any penalties or forfeitures recovered under any Act relating to the customs, excise, and post office, or to trade or navigation, or any branch of His Majesty's revenue."

(2) 3 & 4 Vict. c. 97, s. 16, enacts that "if any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway, or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company, every such person so offending, and all others aiding or assisting therein, shall and may be seized and detained by any such officer or agent, or any person whom he may call to his assistance, until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and when convicted before such justice

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the fines ought to be paid to the treasurer of the borough to the credit and on account of the borough fund, inasmuch as the Act under which the penalties were recovered is not an Act relating to trade, so as to bring it within the provisions of the last mentioned section. (1)

The question for the opinion of the Court is whether the fines ought to be paid to Her Majesty or not.

1877. Dec. 6. *Sir Hardinge S. Giffard, S.G.* (*C. Bowen*, with him), for the Attorney General. The two Acts are inconsistent if they are read together, and what is prior in point of time cannot be read as governing the second. The express words of the later Act must, by the ordinary rules of construction, be taken to have been used with reference to the language of the prior one, and pro tanto to repeal it. [He referred to *Wray* v. *Ellis* (2)].

J. W. Mellor, Q.C. (*Dugdale*, with him), for the defendant, was not heard.

KELLY, C.B. I will first, in giving judgment, refer to the earlier Act to see if there is any ambiguity in it, or whether anything is left to be implied, and then I will consider the effect of it on future legislation. It commences, "when by any Act any penalties or forfeitures are or shall hereafter be made recoverable in a summary manner before any justice or justices of the peace." That applies to future as well as to existing Acts, and therefore includes the case of penalties or forfeitures thereafter made recoverable in a summary manner before any justice or justices of the peace, which is the case here. So far the words are applicable, but it continues:

as aforesaid (who is hereby authorized and required, upon complaint to him upon oath, to take cognizance thereof, and to act summarily in the premises) shall in the discretion of such justice, forfeit to Her Majesty any sum not exceeding five pounds, and in default of payment thereof shall or may be imprisoned for any term not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty."

(1) The question whether 3 & 4 Vict. c. 97, s. 16, is an Act relating to trade within the meaning of 5 & 6 Wm. 4, c. 76, s. 126, was not referred to in the argument in the Exchequer Division, and during the argument in the Court of Appeal Sir Hardinge S. Giffard stated that he did not ask for a decision upon this question.

(2) 1 E. & E. 276; 28 L. J. (M.C.) 45.

"and by such Act respectively the same are or shall be limited and made payable to His Majesty or to any body corporate, or to any person whomsoever, save and except the informer, who shall sue for the same or any party aggrieved, in every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace shall be holden as aforesaid, shall, notwithstanding anything in such Act respectively contained, be recovered for and adjudged to be paid to the treasurer of such borough for the time being to the credit and on account of the borough fund of such borough; and no such penalty or forfeiture or share of such penalty or forfeiture shall in any case be recovered by or adjudged to be paid to any other person than the said treasurer, unless such person be the informer or the party aggrieved." So far no inconsistency appears. We then find in the subsequent Act of Parliament, 3 & 4 Vict. c. 97, s. 16, that if any person shall commit a certain offence upon a railway, such person shall or may be seized and taken before one of the justices of the peace "for the county or place wherein such offence shall be committed, and when convicted before such justice as aforesaid shall, in the discretion of such justice, forfeit to Her Majesty any sum not exceeding five pounds." There is thus an Act saying that if this penalty be recoverable and recovered it shall be payable to the Queen; but then we look back to the former Act and see that notwithstanding the Act makes such a penalty payable to the Queen, yet since the complaint is made before the justices of a borough for which a separate court of quarter sessions is holden, the penalty shall not be paid to the Queen but to the treasurer of the borough. I see nothing inconsistent in the two Acts of Parliament. They must be read together, and the earlier Act, the Municipal Corporations Act, introduces into this clause 16 an exception, as to the application of the penalty, to the general terms of the provision that the penalties are to be paid to Her Majesty, and under these circumstances I think the Crown is not entitled to succeed.

CLEASBY, B. I cannot myself entertain any doubt in this case. There is no repeal of the Municipal Corporations Act, s. 126. It

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is in substance this, that all penalties hereafter payable to His Majesty shall go to the borough fund under certain circumstances which are specified. This is the language of the legislature, which deals expressly with penalties to be afterwards made payable to His Majesty. Then a subsequent Act was passed by the same legislature, and it declares, after imposing penalties, that they shall be payable to Her Majesty. The language of the 16th section of 3 & 4 Vict. is "forfeited to Her Majesty." It cannot be said that that is not, within the language of the Municipal Corporations Act, payable to Her Majesty. I can see no inconsistency whatever between the two statutes; the one carries out the object of the other and increases the penalties, which are to go to the borough fund.

POLLOCK, B., concurred.

Judgment for the defendant.

The Attorney General appealed.

1878. Feb. 28. *Sir Hardinge S. Giffard, S.G.*, for the Attorney General.

Kenelm Digby and *G. G. Kennedy* (*John W. Mellor, Q.C.*, with them), for the defendant.

BRAMWELL, L.J. I feel no doubt as to this case. The Municipal Corporations Act, s. 126 contemplates that by future legislation penalties will be imposed payable to the Crown, and that this subsequent legislation will not discriminate between boroughs having quarter sessions upon the one hand and boroughs not having quarter sessions and counties upon the other; it therefore provides that wherever by a future statute a penalty is rendered recoverable before justices of the peace it shall, as a general rule, be paid over to the borough fund, if the conviction takes place in a borough having a separate court of quarter sessions. It is a very plain case for the defendant.

BRETT, L.J. In my opinion 5 & 6 Wm. 4, c. 76, s. 126 is not repealed by 3 & 4 Vict. c. 97, s. 16. The earlier statute contem-

plates that by subsequent Acts penalties will become payable to the Crown, and it provides that in certain cases they shall go to the borough fund. The 3 & 4 Vict. c. 97, s. 16 does not repeal in express terms 5 & 6 Wm. 4, c. 76, s. 126; and I apprehend that it does not repeal it by implication, because the two may be read together, and some application may be made of the words in the later Act consistently with the existence of the words in the earlier Act. The words of 3 & 4 Vict. c. 97, s. 16 apply in their ordinary sense to every instance, except to the case of boroughs having separate courts of quarter sessions. The penalty is forfeited to the Crown, but pursuant to the earlier statute it must be paid over to the borough fund.

COTTON, L.J. I am of the same opinion. The object of the Municipal Corporations Act, s. 126 was to grant to the borough fund certain penalties forfeited to the Crown, and this consideration alone will make the two statutes consistent; but it is to be further observed that the later Act will apply in direct terms to all cases except those where boroughs have separate courts of quarter sessions.

Judgment affirmed.

Solicitors for Attorney General: *Hare & Fell, for the Solicitor of the Treasury.*

Solicitors for defendant: *Hare & Fell, for G. Moore, Warwick.*

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May 2.

[IN THE COURT OF APPEAL.]

ACATOS *v.* BURNS AND ANOTHER.

Ship and Shipping—Authority of the Master to sell Goods damaged on the Voyage—Freight pro ratâ itineris—Warranty by Shipper that Goods were fit to be shipped.

A master of a vessel cannot at an intermediate port sell goods, which are damaged and cannot be carried to the port of discharge, without communicating with their owner.

Where goods damaged on the voyage are landed at an intermediate port and sold without the assent of their owner, the shipowners are not entitled to freight pro ratâ itineris.

Where the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage.

CLAIM stated that on the 1st of March, 1876, the plaintiff by his agent, one Zalachi, at Constantinople, caused to be shipped on board the defendants' steamship *Sidon*, 439 quarters of Indian corn or maize of the plaintiff in good order and condition to be carried from Constantinople to Liverpool, and thence to be delivered in like good order and condition to the plaintiff, certain perils only excepted, according to the terms of a certain bill of lading then signed for the same by the agents of the ship: that the defendants did not carry to and deliver at Liverpool the goods, although not prevented by any of the excepted perils from so doing, but the defendants, without the consent of the plaintiff, transferred the maize from the ship while lying at the port of Smyrna into lighters, and afterwards, and without the consent of the plaintiff, sold the same at a price much below its real value, and converted the maize to their own use, and wrongfully deprived the plaintiff of it.

Defence and counter-claim.

The defendants admitted the non-delivery of the maize, and denied it was shipped in good condition, and alleged that the port of Smyrna was a port where by the terms of the bill of lading the defendants' steamship, the *Sidon*, had liberty to call. On her arrival there the parcel of maize was found to be in such a con-

dition, owing to its inherent vice, or to the operation of causes within the true intent and meaning of the exceptions and other provisoes of the bill of lading, as to render the further transport of the same impossible, and the presence of the same on board the steamship dangerous to the steamship and her cargo. In consequence of its condition the parcel of maize was unloaded and sold at Smyrna. That the sum due from the defendants to the plaintiff in respect of the proceeds was 77*l.* and the defendants admitted their liability to the plaintiff in respect of that sum subject to the defendants' counter-claim. They also denied the conversion.

By way of counter-claim the defendants claimed that the condition of the parcel of maize at the time of its shipment at Constantinople was such as to render its shipment on board the defendants' steamship the *Sidon* dangerous to the steamship and her other cargo; that the dangerous condition of the maize was not apparent, and that the defendants did not and could not be expected to know the same; that the plaintiff had knowledge of the dangerous condition of the maize at the time of its shipment, and wrongfully shipped the same on board the defendants' steamship without giving the defendants notice thereof. On the arrival of the steamship at Smyrna the dangerous condition of the maize was discovered, and the same unloaded and sold, and that the steamship was in consequence detained at Smyrna and her detention had occasioned a loss to the defendants.

That it was agreed between the plaintiff and the defendants that the plaintiff should pay the defendants a proportionate amount of freight for the carriage of the goods from Constantinople to Smyrna, but the plaintiff has not paid the same.

Reply denied the allegations in the statement of defence and counter-claim, and alleged as to the demand for freight pro ratâ that the plaintiff always insisted on his right to have the maize carried to Liverpool. Issue thereon.

At the trial at the London Michaelmas Sittings, 1877, before Huddleston, B., the following facts were proved. The maize was shipped at the end of February, 1876, by the plaintiff's agent at Constantinople on the defendants' steamer *Sidon* to be carried to and delivered at Liverpool. It was taken alongside the steamer

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in lighters and shipped in bulk; it was winnowed on board by the plaintiff's agents, and after every fifty kilos were shipped the second officer of the *Sidon* examined it; apparently it was in good order and condition. On the 3rd of March the vessel arrived at Smyrna; the master then found that the maize had become heated, and after a survey held on the 7th of March a portion of it was discharged into a lighter; on a further survey it was found that some of it had sprouted, and that the whole parcel was in bad condition, and could not be kept on board without danger to the rest of the cargo. The remainder of the maize was then discharged into three other lighters, and the four lighters with the 439 quarters of maize were brought into the new docks at Smyrna. On the 16th of March the *Sidon* sailed from Smyrna for Liverpool without the maize. Endeavours were then made to have the maize carried to Liverpool by other steamers, but without success; the masters of several steamers having refused to take it on any terms on account of its bad condition.

On the 10th of March, the defendants' agent at Smyrna, Malcozzi, telegraphed to the defendants' agent at Constantinople, Grace, to inform the shipper of the maize, the plaintiff's agent, that it had heated; that a survey had been held, and that Lloyd's agent recommended its discharge and disposal. On the 12th of March, Grace telegraphed to Malcozzi, "Merchant wishes grain to go to Liverpool." On the 13th of March, Malcozzi again telegraphed to Grace: "Second survey held; grain worse; recommended the immediate discharge and disposal; grain impossible to support voyage to Liverpool." On the same day Grace again telegraphed to Malcozzi: "Merchant wishes grain to be forwarded to Liverpool." On the 27th of March a third survey was held which was most unfavourable, and Lloyd's agent again recommended that the grain should be disposed of for the benefit of the parties. On that day, after the survey, Malcozzi telegraphed to Grace: "have held survey, which reports grain unfit for shipment, and which will be sold to-morrow by public auction for the benefit of whom it may concern." On the 28th of March, Grace telegraphed to Malcozzi: "Shippers protest strongly against sale of grain; want stuff to remain in lighters until they come down personally." On the 28th of March, the maize was sold by public

auction, and realised 77*l.* after deducting expenses. An agent was sent to Smyrna from Constantinople on behalf of the plaintiff, to inspect the maize and act on his behalf in such manner as might be necessary, but on his arrival he found that the maize had been sold.

The jury found, in answer to questions left to them by the learned judge, that the maize was not in good order and condition when shipped at Constantinople, and was in such a state as would be dangerous to the ship and cargo, but not apparently so to the shipper. That its state could not be ascertained by reasonable means, and that all reasonable means had been adopted. That the defendants could have communicated with the owner of the maize before they sold it, and that the sale under the circumstances was not one of such urgent necessity as to give no time or opportunity for communicating with the owner; and that the sale of the maize in the manner the defendants sold it was a prudent measure.

The plaintiff claimed to be entitled to judgment, not only for 77*l.* the proceeds of the sale, but for the actual value of the grain, which was agreed between the parties to be 100*l.*

The learned judge directed judgment to be entered for the plaintiff for 77*l.* on the claim; and also directed judgment to be entered for him on the counter-claim.

The plaintiff appealed against so much of the judgment as decided that he was not entitled to the actual price of the grain. The defendants brought a cross appeal on the judgment on the counter-claim.

May 1. *Watkin Williams, Q.C.*, and *McLeod*, for the plaintiff. The sale of the cargo was unlawful, inasmuch as the captain had an opportunity of communicating with its owner. It is immaterial that the jury have found that it was reasonable and proper to sell, for they have also found that there was no urgent necessity for the sale. It is "urgent necessity" alone which justifies a sale, and the cargo ought to have remained at Smyrna in lighters until the decision of the owners could be known. *Cohequid Marine Insurance Co.* v. *Barteaux* (1) is an authority very much in favour of the plaintiff, for it related to the sale of a ship by her captain; and

(1) Law Rep. 6 P. C. 319.

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the master of a vessel may be considered the agent of her owner, but he can hardly be deemed the agent of the owner of the cargo. The captain may have acted bonâ fide; but the defendants are liable for the sale of the maize, for it might have been carried on and delivered at its port of destination, although in a damaged condition: *Tronson* v. *Dent*. (1) The sale being wrongful, the plaintiff is entitled to the actual value of the maize.

May 2. *C. Russell, Q.C.*, and *Warr*, for the defendants. The extent of the master's authority to sell the cargo depends upon all the circumstances of the case. In this case, the cargo was damaged by its own inherent vice; it was a perishable cargo; great expense would be incurred by keeping it in lighters, and it was daily deteriorating in quality and value; it was therefore for the benefit of all parties that the cargo should be sold. If the master did not sell, the position of the shipowner would be one of risk. The master would have to pledge his owner's credit for the rent of the lighters or the warehouse. Then for how long was he to keep the goods warehoused?

[BRAMWELL, L.J. The jury have found that there was no urgent necessity for the sale; the sale was therefore wrongful.

BRETT, L.J. It has been fully established by authority, that the master cannot hypothecate the cargo or freight if he has the means of communicating with the owner, and that is a question of fact for the jury.]

The argument on the other side is that, although the goods are perishing from an inherent vice, yet if the shipper objects to a sale the master cannot sell the goods. What then is he to do with them? he cannot throw them on the quay and there leave them. The master is bound to act reasonably with regard to the owners of the ship and of the cargo, and he must consider the other freighters. He is only bound to do what a prudent man would do: he is not bound to sacrifice the voyage. *The Gratitudine* (2). The bailment in this case differs from all other bailments; here the bailee through representing the ship is representing the goods as well, and must do what an owner of goods would reasonably under the circumstances do. There is ample authority in the master, when

(1) 8 Moo. P. C. 419, at p. 448. (2) C. Rob. 240.

goods cannot be carried on in specie, to sell them, and to do his best for all parties. *Notara* v. *Henderson.* (1)

Secondly. Assuming that the sale was rightful, the defendants are entitled to freight pro ratâ. *The Soblomsten.* (2)

Thirdly. There was a warranty that the goods were fit to be shipped, and there was a breach of this warranty: *Brass* v. *Maitland* (3). That case is approved of in the American courts in *Pierce* v. *Winsor.* (4) All the cases on the point are collected in Angel on Carriers, s. 212, note *c.*

W. Williams, Q.C., was heard in reply.

BRAMWELL, L.J. I think that the plaintiff's appeal must succeed. I think that, when the jury found that to have sold the maize in the manner the defendants did was a prudent measure, it may seem hard on them that they should have to pay damages, and damages to a greater amount than the maize sold for; but the sale was a tortious act, and the defendants must therefore pay damages amounting to the sum agreed upon, and properly agreed upon, between the parties. My view of the facts is this: the goods were put into lighters with the hope that they might be taken on to Liverpool by some other ship, and that expectation was continuing until the defendants sent the telegram of the 27th of March, 1876, "have held survey, which reports grain unfit for shipment, will be sold to-morrow by public auction for benefit of whom it may concern." That is the first notice given to the plaintiff or to his representative at Constantinople that the maize will not be sent on, but that it will be sold, and, before the plaintiff's representative can express any opinion, it is sold. Under these circumstances, it is clear that the defendants had no authority to sell the maize. On the argument a difficulty was made as to what the defendants should do with the maize. It was asked, Was the maize to be kept in the lighters? Was it to be landed and warehoused, and if so, at whose expense? I think it is not necessary to give any answers to those questions, but it is sufficient to confine ourselves to the special circumstances of the case.

(1) Law Rep. 5 Q. B. 346; Law Rep. 7 Q. B. 225.

(2) Law Rep. 1 A. & E. 293.

(3) 6 E. & B. 471; 26 L. J. (Q.B.) 49.

(4) 2 Sprague, 35.

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The maize was in lighters, and the jury have found that there was no urgent necessity for the sale. The defendants could have communicated with the plaintiff, the owner of the maize, and might, therefore, have asked him whether it should be sold or not; but they gave him no opportunity to express his views on the transaction, and we cannot hold that the maize was lawfully sold.

As to the question of damages. The measure of damages is not what the maize realised at the sale, but what it would be worth to the owner if it had not been sold. If the question had been left to the jury, I am not sure that they would have found that it was worth more than it actually sold for, but it is probable that they might; and, therefore, when it was proposed to take the opinion of the jury on this question, the parties very properly and prudently agreed that the damages should be 100*l*. If, therefore, the sale was tortious, the damages must be increased to that amount.

The counter-claim is framed on the assumption that, in point of law, the plaintiff warranted that the maize was in a fit state to be carried when shipped. But there was no such warranty. We might admit that *Brass* v. *Maitland* (1) was correctly decided, and yet say that it does not govern this case. For the quality of the maize tendered for shipment was as much known to the one side as the other. Without, however, going further into the question, I am of opinion that there was no warranty.

As to the claim of freight pro ratâ, there can be no claim for such a thing unless the original voyage is given up by consent of both parties, and there is an acceptance of the goods at the intermediate port. This is the general rule, and it applies to the present case.

I am of opinion, therefore, that the plaintiff is entitled to succeed on this appeal.

BAGGALLAY, L.J. I entirely agree with the opinion of Bramwell, L.J., that the sale was wrongful. The law is clearly laid down in the case of *Australasian Steam Navigation Co.* v. *Morse.* (2) "The authority of the master of a ship to sell the goods of the

(1) 6 E. & B. 471; 26 L. J. (Q.B.) 49. (2) Law Rep. 4 P. C. at p. 228.

absent owner is derived from the necessity of the situation in which he is placed; and, consequently, to justify his thus dealing with the goods, he must establish, first, a necessity for the sale, and, secondly, inability to communicate with the owner and obtain his directions." As to the possibility of communicating with the owner of the cargo, there can be no doubt of it, for communications were made; the survey by Lloyd's surveyor was communicated, and on the 13th of March there was a communication of a further survey. The owner gave no consent to any sale, but protested against it, and always insisted that the maize should be forwarded. With regard to the notice of the 27th of March, it was a notice that the maize would be sold the next day, and there was no time for the owner to stop the sale. It is clear, therefore, that the sale was wrongful.

With regard to the counter-claim claiming freight pro ratâ, I have nothing to add. I ought also to say that I think that there was no such warranty as to the quality of the maize shipped as suggested.

BRETT, L.J. The question is, what verdict ought to be entered on the findings of the jury? We must look at the evidence only to ascertain what is the meaning of the findings, for the appeal is on the footing that the findings are correct.

Had the master authority to sell, and was the sale lawful or wrongful? On the present findings we must take it that the goods were of a perishable nature, and had an inherent vice at the time of shipment, and that was the cause of their being landed at Smyrna, and if something had not been done with them, they would have perished. The sale was a reasonable sale as regards the nature and condition of the goods, but it was a sale without the consent of the owner. The question therefore is, whether the master, under such circumstances, had authority to sell the goods? The first point made was that the authority of the master to sell goods is to be measured differently when the goods become perishable owing to their own inherent vice at the time of shipment, and when they become so from being damaged by perils of the sea. There is no ground for any such distinction. The authority of the master is the same whether the sale is rendered necessary from injury arising

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from the inherent vice of the goods or from sea damage. Primâ facie, the master has no authority to sell; he may have such authority under certain circumstances, which may arise from something happening to the ship, or from something happening to the cargo; but the law of England looks with jealousy on the master selling any part of the cargo without the consent of its owner, and it gives the master no authority, unless there is an urgent necessity for the sale.

Now an urgent necessity for a sale may arise from several causes. There may be an urgent necessity to sell goods, arising from the fact that if the goods are not sold they will perish, or that they will have to be kept in warehouses at great expense, so that as a matter of business it would be wrong to warehouse them; and it must be shewn that the master has no means of communicating with the owner, and taking his directions whether he shall sell them or not. But I think, whether the goods are of a perishable nature or not, if the master has an opportunity of communicating with the owner before they actually perish, he cannot sell without communicating with the owner and obtaining his directions: and if the master obtains directions, and the owner of the goods refuses his consent to a sale, the master cannot sell, although the goods are of a perishable nature. It is not necessary to lay down rules as to what the master should do in every case, but clearly he has no right to sell after receiving directions to the contrary. The jury here have found that there was no urgent necessity for a sale; therefore, in the present case the sale was wrongful.

I ought to mention that, according to the decision of *Australasian Steam Navigation Co.* v. *Morse* (1), if the only question put to the jury was whether the sale of the maize in the manner it was sold was a prudent measure, and the jury had found that it was, the defendants would have been entitled to succeed; for the jury would have been taken to have found that there was an urgent necessity for the sale, so as to give no time for communicating with the owner, but the particular questions left by the learned judge have ousted the defendants of this defence.

The law is correctly laid down in several cases decided by the

(1) Law Rep. 4 P. C. 222.

Privy Council, and though those decisions are not authorities which bind us, we are always glad to be able to follow them. The law is to be found in the cases *The Cargo ex Hamburg* (1) and *The Bonaparte* (2), where the judgment of Knight Bruce, L.J., in the former case is corrected thus: "If according to the circumstances in which he [the master] is placed it be reasonable that he should —or if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case there, it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." That is an express decision that before selling the goods the master must communicate with the owner. Then, in *Australasian Steam Navigation Co.* v. *Morse* (3), in a careful and elaborate judgment Sir Montague Smith says, "The general principles of law are not in dispute, viz., that the authority of the master of a ship to sell the goods of the absent owner is derived from the necessity of the situation in which he is placed; and consequently that to justify his thus dealing with the goods he must establish, first, a necessity for the sale; and, secondly, inability to communicate with the owner and obtain his directions. Under these circumstances, and by force of them, the master becomes the agent of the owner, not only with the power but under the obligation (within certain limits) of acting for him; but he is not in any case entitled to substitute his own judgment for the will of the owner, in the strong act of selling the goods where it is possible, as hereafter explained, to communicate with the owner, and ascertain his will."

In that case it is laid down, however unreasonable the owner may be, the master has no right to sell the goods against his will. If he has time to ascertain the owner's will, he is bound to communicate with him, and if he does not, the sale is wrongful. The defendant, in the present case, has failed to shew that there was so urgent a necessity as to justify a sale without the consent of the owner.

If the sale was wrongful, the amount for which the goods were sold at the intermediate port is not the true measure of damages,

(1) 2 Moo. P. C. (N. S.) 289. (2) 8 Moo. P. C. 459.
(3) Law Rep. 4 P. C. 222, at p. 228.

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but the value of the goods to the owner: that has been estimated at 100*l.*

The claim for pro ratâ freight is clearly not maintainable, and it is unnecessary to give any reasons for deciding against it.

As to the question of warranty, neither *Brass* v. *Maitland* (1) nor any other case shews that there is a warranty by the shipper that the goods shipped have no concealed defects at the time of shipment.

Appeal of the plaintiff allowed; cross appeal of the defendants dismissed.

Solicitors for plaintiff: *Tatham, Oblein, & Nash.*

Solicitors for defendants: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

June 26.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PENRYN *v.* BEST.

Market—Prescription to prevent Owners of Shops selling in them on Market Days.

The grant of a market, with the addition of the words "with all liberties and free customs to such a market belonging," does not imply a right in the grantee to prevent persons selling marketable articles on market days within the limits of the franchise.

Such a right may be gained by immemorial enjoyment or prescription.

The plaintiffs claimed to be entitled by prescription to a meat market within a borough, and as incident thereto they claimed the right to prevent butchers from selling meat in their own shops on market days within the limits of the franchise. The evidence was that from the time of living memory down to 1862 butchers who had shops in the borough closed them on market days, and resorted to the market and sold there, paying stallage: that in 1862 two butchers refused to do this, but on actions being brought submitted, and thenceforth paid toll for keeping their shops open on market days, and that the defendant had paid a similar toll for some years before 1875 when he declined to continue the payment:—

Held, reversing the decision of the Exchequer Division, that the evidence was sufficient to support the claim to prevent the owners of shops from selling in them on market days.

STATEMENT OF CLAIM alleged that the plaintiffs were owners in fee of a certain market, holden in the borough of Penryn, in the

(1) 6 E. & B. 471; 26 L. J. (Q.B.) 49.

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county of Cornwall, on Thursdays and Saturdays in each week, for the buying and selling, amongst other things, of flesh meat, together with tolls, stallage, and other perquisites and profits to that market appertaining; and all persons selling flesh meat on Thursdays and Saturdays within the borough ought of right to sell the same within the market, and not in any private shop without payment to the plaintiffs of the tolls, stallages, and other perquisites and profits of the market; but that on Saturday, the 4th of December, 1875, and from that date, on each Saturday thereafter, the defendant exposed for sale in his shop within the limits of the borough, flesh meat, and refused to pay the plaintiffs any of the tolls, stallages, or other perquisites and profits of the market, and caused them to lose the tolls, and thereby disturbed the plaintiffs' market.

The action was tried before Lord Coleridge, C.J., at the Middlesex Michaelmas Sittings, 1876.

At the trial it appeared that in 1259 Henry III. granted to the Bishop of Exeter a market at the manor of Penryn, and a charter of Richard II., in 1380, recites by inspeximus the former charter, and grants and confirms unto the then Bishop of Exeter "that he and his successors for ever may have a market in his manor of Penryn in Cornwall every week on Monday," and it orders that the bishop and his successors may have the aforesaid market and a yearly fair, "with all liberties and free customs appertaining to a market and fair of this kind."

The borough of Penryn was incorporated by charter of James I. in 1621. The Bishops of Exeter at various times leased the lordship of Penryn Burrough, and the Town Burrough and Burgage of Penryn, with all the appurtenances, among which were mentioned markets, to trustees for the corporation, and in 1820 to the corporation direct, who in 1875 became purchasers (from the Ecclesiastical Commissioners) of the manor.

On behalf of the plaintiffs it was proved by the town clerk that since 1848, when he was appointed to his office, the meat market had been held on Saturday and not on Monday, and that the butchers in the borough had closed their shops on Saturdays and had sold their meat in the market, in stalls provided by the council for which 1*s.* 6*d.* was charged as stallage. It was also proved by

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J. Robins, who was sixty-three years of age, that as far back as he could remember, the usage as to the meat market in the borough had been such as was deposed to by the town clerk. This witness was not cross-examined, and the evidence on this point adduced by the plaintiffs was not sought to be controverted. It was also proved that in 1862 there was a dispute between the plaintiffs and two butchers who sold meat in their shops on market days, but refused to pay 1*s.* 6*d.* to the council for doing so. They were accordingly sued for disturbance of franchise of market, but they submitted to verdicts, and paid the toll demanded. Afterwards these two and the other butchers in the borough paid toll on every occasion on which they sold in their own shops on market days. The defendant himself paid the toll for some years, but in 1875 he declined to do so, or to close his shop on Saturdays.

A verdict was found by direction of the learned judge for 20*s.* for the plaintiffs, who moved to enter judgment for that amount.

Jan. 11. *Herschell, Q.C.*, and *Charles, Q.C.*, for the plaintiffs. *Murphy, Q.C.*, and *Wormald*, for the defendant.

Cur. adv. vult.

Feb. 4. The judgment of the Court (Cleasby, B., and Hawkins, J.) was delivered by

CLEASBY, B. This is an action for the disturbance of the market of the plaintiffs. The plaintiffs are no doubt entitled to have a meat market on Saturdays, and the defendant on a Saturday, when the market was held, sold meat in his own private shop in the town, at some distance from the place where the market was held. The question is, whether the franchise of the plaintiffs was of such a nature that they could maintain an action against the defendant. Similar questions have arisen before, and two conclusions may be considered as settled by authority.

First, that the mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held. This was decided in the case of *Mayor of Maccles-*

field v. *Chapman*. (1) It is pointed out in the judgment that an old case, the *Prior of Dunstable's Case* (2), had been erroneously supposed to decide the contrary. It may also be considered as decided by the case of *Earl of Egremont* v. *Saul*. (3) We feel bound by these authorities, although dicta may no doubt be found to the contrary. See the case of *Mosley* v. *Chadwick* (4), referred to in the note.

The second conclusion by which we are bound is that such a right as is contended for may be acquired by immemorial enjoyment or prescription. For this there are two decisions, *Mosley* v. *Walker* (5) and *Mayor of Macclesfield* v. *Pedley*. (6)

It is not necessary to say anything about the effect of a modern grant, or a grant since the time of legal memory, of a market, with this additional incident of preventing persons from selling in their own houses within the limits of the franchise. The question does not arise in the present case, but there are obvious objections of a serious nature to the grant of a franchise which prevents persons who were selling meat at the time in their private houses from continuing to do so.

The facts brought before us in the present case are as follows:— We understand that the verdict of the jury was not taken upon any particular question, but, upon the evidence being given, a verdict was taken for the plaintiffs generally, it being considered that there was sufficient evidence to warrant that verdict. But the Court was, upon the case being brought before them, to deal with the facts and say what was the proper conclusion.

Evidence was given of a charter in the reign of Henry III., A.D. 1259, by which the King granted that the Bishop of Exeter and his successors might have a market in his manor of Penryn every week, on Monday, and also in every year a fair of three days' duration on days named, and that they should have the aforesaid market and fair with all liberties and free customs appertaining to such a market and fair, except that they were not to be to the nuisance of neighbouring markets and fairs. Proof of this

(1) 12 M. & W. 18.
(2) 11 H. 6, f. 19 a, and cited in City of London's case; 8 Rep. 127, a.
(3) 6 Ad. & E. 924.
(4) 7 B. & C. 47, n. (a).
(5) 7 B. & C. 40.
(6) 4 B. & Ad. 397.

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was given by a charter of confirmation upon an inspeximus in the reign of Richard II. We think that, having regard to these two charters, there is no sufficient ground for regarding the charter of Henry III., which refers to no previous grant, as a confirmation of any previous grant of a market, notwithstanding the use of the not unusual words "grant and confirm" at the commencement.

A number of leases were produced from the bishop to the borough of Penryn of property in the borough, and all these leases contained the general words "together with all markets," but there was no particular reference in any lease to the market which formed the subject of the grant by the Crown to the Bishop of Exeter, or to the charter of Henry III. These leases were granted from time to time, and may be said to have brought the right of market down to the time when the borough became purchasers of the bishop's rights from the Ecclesiastical Commissioners. One of the leases, that of 1745, contained an indorsement of delivery of seisin of the guildhall and market houses. This is of importance as shewing all rights of the plaintiffs to the market were derived from the bishop.

There was also evidence of the holding by the plaintiffs and their predecessors in title of a meat market on Saturdays, so far as living memory goes. But there was no evidence to connect in any way the market so held with the Monday market granted in 1259.

There was further evidence that there were three or four butchers who had shops in the town, and that it had been usual for these butchers on the Saturdays when the market was held to close their shops and go and sell in the market, and that this had been done till 1862, and it was further proved that in that year two butchers opened their own shops on Saturdays and disputed the right of the corporation to prevent it, and that writs having been issued against them they submitted and paid the costs, and that they have since had their shops open on the Saturdays and paid the plaintiffs toll, which must mean, no doubt, the stallage which the plaintiffs would have been entitled to if the butchers had occupied stalls in the market house.

Authorities were referred to for the purpose of shewing that no right to tolls was acquired by the charter referred to, particularly

Heddy v. *Wheelhouse* (1), but the real question in this case is not the right to tolls eo nomine, but the right to compel the defendant to sell in the market house, if at all, by which the plaintiffs would acquire a right to stallage as owners of the soil. And the real question is whether the evidence establishes any such right.

The facts are peculiar, because we have a charter for a market on Monday, and the proof is that no market has ever been held on Monday, but there is proof of a meat market having been held on Saturday.

If the proof had been of a charter for a meat market on Saturday in the terms of the present charter, the grant being of a market and fair, with all liberties and free custom to such a market and fair belonging (the words in the original, no doubt, being "cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi mercatum et feriam pertinentibus"), as in the case of *Earl of Egremont* v. *Saul* (2), we should have felt satisfied that there is not sufficient to justify us in reading the grant as a grant of a market with the incident of preventing persons from selling meat in their own houses away from the market. As this incident is not a liberty belonging to a market, it would be enlarging the franchise beyond the words, and would be at variance with *Earl of Egremont* v. *Saul*. (2) But the plaintiffs rested their case mainly upon another ground, viz., that there was sufficient evidence to warrant the conclusion of a right by prescription to hold a market on Saturday with this incident, and it was said that, if there was sufficient evidence of this enjoyment, the plaintiffs ought not to be worse off because there was in 1259 also an express grant, which had vested in them, of a Monday market. The cases of *Mosley* v. *Walker* (3) and *Mayor of Macclesfield* v. *Pedley* (4) are referred to as shewing that such a right might be so gained, but upon referring to these cases, and the evidence produced in the present case, we find a very great difference.

We cannot examine in detail the evidence in those cases upon which the jury found in favour of the right, but it appears to us

(1) Cro. Eliz. 558, 591.
(2) 6 Ad. & E. 924.
(3) 7 B. & C. 40.
(4) 4 B. & Ad. 397.

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that if the same question had been left to the jury in this case, they ought upon such different evidence to come to a different conclusion. The evidence in the present case, except as to the existence of a market, only dates from the year 1848, and from that time to 1862 the only proof is that on the market day the butchers closed their shops and resorted to the market. This is entitled to very little consideration as shewing that the butchers were under an obligation to close their shops; it is equally reconcilable with its being more to their advantage to sell in the market than at home. And it only dates from 1848. In 1862 they claimed the right to keep their shops open on Saturdays. Two actions were, however, brought and submitted to by two butchers, and since that time the butchers who have opened their shops on Saturdays have paid toll until the present defendant disputed the right. This evidence is, in our opinion, far too weak to justify the conclusion of the right being gained by immemorial enjoyment, more especially when taken in connection with a charter being granted in 1259 for a market with ordinary incidents. The enjoyment of the right claimed is, properly speaking, only from 1862, as we consider the attendance of the butchers at the market on market days as proving little or nothing. The actions brought afterwards and submitted to, though proof of enjoyment, are no further evidence against the defendant, and the proof of payment of toll even by the defendant (as one of the witnesses says he believes) would not be conclusive. To justify the conclusion of immemorial enjoyment the evidence ought to go further back, and be like such as was given in the two cases last referred to, and the effect of the evidence is also weakened by the demand of the plaintiffs (which was acceded to) being for tolls which they were certainly not entitled to, their only right being to stallage as owners of the soil of the market. The payments might be made under the belief that the plaintiffs were entitled to tolls, and not as an acknowledgment that the plaintiffs were entitled to make them close their shops.

We have considered the case upon the merits, and not with reference to the particular claim set up in the statement, viz., to tolls and stallages for selling out of the market, which seems open to objection, but might have been amended.

For the above reasons we think the plaintiffs have not established the right claimed, and that there must be judgment for the defendant.

Judgment for the defendant.

The plaintiffs appealed.

June 22. *Herschell, Q.C.*, and *Charles, Q.C.*, for the plaintiffs. *Murphy, Q.C.*, and *Wormald*, for the defendant.

Cur. adv. vult.

June 26. The following judgments were delivered :—

BRAMWELL, L.J. I am of opinion that this appeal must be allowed. We do not differ from the Exchequer Division on the point of law, but upon a question of fact, as to which we think there has been a misapprehension in the Court below.

Now, the first question that arises here is, Have the plaintiffs shewn a title to a Saturday market? I think we ought to hold that the plaintiffs have a title to such a market. We can have no doubt that such a market has been held as long as living memory goes, and there is nothing to shew that there is not a right to a Saturday market, except certain charters which shew they once had a right to a Monday market. It is obvious they may have a right to hold two markets. The Crown may have granted the charter of the one, as well as of the other, or it may have made a grant of the Saturday market on the ground of the Monday market having got into desuetude and not being held. It is a most convenient thing that every supposition, not wholly irrational, should be made in favour of long-continued enjoyment. Probably if these plaintiffs were attempting to hold a Monday market as of right, the most vigorous efforts would be made to shew they had no right to do so. I think, therefore, we ought to hold the plaintiffs have shewn a title to a Saturday market.

Then the next question is this : Was there such a right attached to the market as was necessary to enable the plaintiffs to maintain this action? It was contended that if there was a modern grant creating a market in a particular place, that would not, of itself, entitle the grantee to shut up shops. But, on the other hand, authorities were cited, and it was stated to be law that a person

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entitled to a market by prescription, not only has certain rights within the place where the market is held, but may also say to persons within a certain area, "You must shut up your shop when my market is held, or you must pay me some compensation for selling in your shop." I take it that is established law, and can only be altered by the legislature, or, at all events, by the ultimate Court of Appeal, after the number of years it has been in existence. I think that possibly at the time the charter was granted, the whole area of the manor or town of Penryn was in the grantee of the market, and he could hold it where he liked; and in truth he could be considered as holding it anywhere, although what we may call the "focus" of the market might be in one place. The law is as I have stated, and it is competent for the plaintiffs to maintain such a right upon sufficient evidence. Now, upon this point we concur with the Court below, and the only question is, whether they were right in the conclusion they drew from the evidence? It seems to me they would have been right if the facts had been as they have assumed in the judgment. I understand the assumption in the judgment is, that the earliest evidence of any such exclusive right as the plaintiffs were asserting was in the year 1848: but that really is not so; on the contrary, the evidence is this, that as long as living memory can trace back (and one of the witnesses called was sixty-three years of age, therefore we may assume he may well remember for fifty years back, or possibly more), the state of facts has existed upon which the plaintiffs rely. There is evidence that as long as living memory can trace, when this market was held all the butchers' shops in Penryn were shut up; and the butchers, even those who occupied the shops within a few yards of the market-house, not only shut up their shops, but went into the market and sold their meat, as any other person going into the market to sell their articles would have done. It is said by Mr. Murphy, that of itself proves very little, because, as the market would be the place to which the intending purchasers would throng, butchers would naturally go there, and shut up their own shops. I cannot help thinking that, though a butcher might like his stall in the market, he might also keep his shop, which was within a few yards of it, open; but every one in Penryn shut their shops; I think that is a very remarkable thing,

and cannot be accounted for, if such a right as the plaintiffs contend for did not exist. Further, there is this, in the year 1862 there were two recalcitrant butchers, who resisted the right of the corporation, and the corporation then insisted upon their right, and these butchers acquiesced and paid the dues claimed. They did not shut up their shops, they continued to have them open, but upon the terms of making compensation to the plaintiffs upon the footing that the plaintiffs were entitled to the right they now claim. This is open to the observation was it not much better for them to pay the trifle they had to pay than run the risk of litigation with a corporate purse? But it is met by this, that at the present moment this defendant does not think so, and I do not know why we should say his predecessors in the butcher trade may not have acquiesced in it, because they knew the corporation were right. But suppose it is a piece of evidence which admits of the observation Mr. Murphy made, what else can a plaintiff prove in such a case? He cannot prove more than that he has asserted his title when the occasion has arisen, and that assertion has been acquiesced in. If evidence of title were to be met by such arguments as this, I am not sure it would not weaken the best title, because, when a man is found trespassing, and being pursued pays a small sum in respect of the trespass, and the owner of the property afterwards relies upon this as proving possession, it might be said, "It was much better for the man to pay you a few shillings than to contest your right." Assuming, for the reasons I have given, that there was a good Saturday market here, and assuming, as I think we are bound to do, there might be such a right annexed to the market as the one claimed, it seems to me the plaintiffs have proved their case, and I agree that the evidence, when appreciated, is stronger than in the case of *Mosley* v. *Walker*. (1) As I have said before, the judgment of the Exchequer Division was founded upon this, that the earliest evidence of enjoyment was in 1848. If that had been so, and it had been left uncertain what had been the practice of the butchers and the corporation prior to 1848, and within the time of living memory, I should have thought it was a very different case, but the evidence being, as I have pointed out, it seems to me we ought to give judgment for the plaintiffs.

(1) 7 B. & C. 40.

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BAGGALLAY, L.J. I am of the same opinion. I entirely assent to the principles of law as laid down in the Exchequer Division; first, that the mere grant of a market does not of itself confer a right to prevent persons selling in their shops on market days within the town or manor where the market may be held; and, secondly, that such right may be acquired by immemorial enjoyment or prescription. I agree in all the conclusions which the Exchequer Division drew from the facts, with the exception to which the Lord Justice has referred. It appears to me that the evidence shews that as far back as living memory went the butchers' shops have been closed on Saturday, and this is sufficient to establish the right claimed by the plaintiffs.

THESIGER, L.J. I am of the same opinion. Inasmuch as there is no difference between the view taken in this Court and that taken in the Court below as to the law, the whole question resolves itself into what was proved at the trial; and I entirely agree in what has fallen from Bramwell, L.J. I think, on the evidence adduced before him, that Lord Coleridge, C.J., was right in directing the verdict to be entered for the plaintiffs.

Judgment reversed.

Solicitors for plaintiffs: *Gregory, Rowcliffe, & Co., for G. A. Jenkins, Penryn.*

Solicitors for defendant: *Harris & Powell, for R. Dobell, Junr., Truro.*

[IN THE COURT OF APPEAL.]

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July 2.

CRUSH AND ANOTHER *v.* TURNER.

Commons Inclosure—Private Ways, Extinguishment of—8 & 9 *Vict. c.* 118, *ss.* 16, 68—*Court of Appeal, Jurisdiction of—Judicature Act*, 1873, *s.* 45—*Appellate Jurisdiction Act*, 1876, *s.* 20.

An appeal lies to the Court of Appeal from the decision of a divisional court, if special leave to appeal is given under the Judicature Act, 1873, s. 45, upon a case stated by a county court judge under 13 & 14 Vict. c. 61, s. 14, notwithstanding the Appellate Jurisdiction Act, 1876, s. 20.

H. previously to the year 1869 was seised of lands in the parishes of W. and B., in which there were waste lands about to be inclosed under the General Inclosure Act, and portions of which would be allotted to him in respect of the ownership of his lands. H. sold his lands, expressly reserving the allotments. The defendant became the purchaser of some of the lands, which were duly conveyed to him, the deed containing the general words as to ways, paths, &c. Some of the waste land was situate between the land sold to the defendant and the high road, and over this waste land there were trackways which had been used by the occupiers of the land conveyed to the defendant for forty years and down to the time of the award under the Inclosure Act, which was made on the 5th and confirmed on the 21st of July, 1871. On the 14th of July, 1870, H. sold the allotments intended to be made to him to C., under whom the plaintiffs claimed, and they were conveyed to C. in March, 1871. The inclosure award, while setting out in the plan attached to the award certain ways over the lands inclosed, did not set out any ways over the allotments sold to C.:—

Held, that by virtue of s. 68 of 8 & 9 Vict. c. 118, which directs private ways to be set out over allotments and stops up all other private ways, the trackways which prior to the award existed over the land allotted to H. were extinguished.

APPEAL from the judgment of the Exchequer Division, that Court being equally divided, on a case stated by a county court judge under s. 14 of 13 & 14 Vict. c. 61.

Action for trespass to recover damages for wrongfully entering the plaintiffs' lands, pulling down the fences, and destroying growing crops.

Defence, that the defendant did the acts complained of in the assertion of certain rights of way to which he was entitled over the land of the plaintiffs.

The plaintiffs derived their title under the will of Robert Crush, and by that will, proved on the 2nd of May, 1875, the property was vested in them. R. Crush derived his title under a deed of conveyance in fee simple from J. A. Hardcastle, dated the 29th of

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November, 1871. J. A. Hardcastle, who was previously to the year 1869 seised of certain farm lands and hereditaments in the parishes of Writtle and Roxwell, in the county of Essex, derived his title to the land on which the alleged trespass above mentioned was committed under an award made by the Inclosure Commissioners for the inclosure of waste lands in the parishes of Writtle and Roxwell. This award, dated the 5th of July, 1871, was finally confirmed by the commissioners on the 21st of July, 1871. By that award an allotment was made to J. A. Hardcastle in respect of certain freehold lands then belonging to him called Wards, situate in the parish of Writtle, containing 185*a.* 2*r.* 5*p.* The lands in question were delineated on two plans, one being a copy of that portion of the map forming part of the commissioners' award, the other being a copy of a plan set out on the deed of conveyance to the defendant. Upon the first of these plans the pieces of waste land allotted to J. A. Hardcastle in respect of the farm called Wards, are numbered 215, 246, and 246a respectively. Some time prior to the year 1869, proceedings under the General Inclosure Act had been going on for the inclosure of the waste lands above mentioned. In the year 1869, J. A. Hardcastle caused certain freehold lands and hereditaments to be put up to sale by auction, at the same time expressly reserving the allotments to be made of the waste lands before mentioned. At this sale the defendant became the purchaser of lot 2, being Ewson's Farm, and the same was conveyed to him by a deed dated the 29th of September, 1869, and which, after setting out the parcels by proper descriptions and abuttals, proceeded as follows :— "Together with all lands, buildings, yards, gardens, orchards, walls, fences, hedges, ditches, timber, and timber-like trees, woods, underwoods, ways, paths, passages, drains, watercourses, lights, easements, privileges, advantages, and appurtenances to the said farm lands and hereditaments hereby conveyed, or any of them belonging or in any wise appertaining or held, used, or occupied therewith, or known, accepted, or reputed as part, parcel, or member thereof." And the defendant also became the purchaser of lots 4 and 5, being Brickhouse Farm and Newhouse Farm, and the same were conveyed to him by a deed also dated the 29th of September, 1869, and, which after setting out the parcels by proper

description and abuttals, contained similar general words as those in the deed conveying Ewson's Farm. Previously to, and at the time of these deeds of conveyance, there were certain trackways over the allotments of waste in question, viz., Nos. 215, 246, and 246a. These trackways had been used by the owners and occupiers of the property so conveyed to the defendant for upwards of forty years as a means of access to and from part of the property and the high road, and such user was continued down to the time of the award by the defendant who continued to assert his right to such user after the award, but such claim after the award has always been disputed by the plaintiffs. On the 14th of July, 1870, J. A. Hardcastle caused the allotments before mentioned, including those numbered 215, 246, and 246a respectively (together with other property), to be put up to auction under certain particulars of sale, which stated that the allotments of the waste lands were sold subject to the regulations set out in the award as to fences, and by the 9th condition of sale it was provided that "Every lot is believed and shall be taken to be correctly described, and is sold subject to all chief and other rents, quit-rents, suits, fines, heriots, and incidents of tenure, rights of way and water, and other easements, if any, chargeable or subsisting thereon, whether mentioned in these particulars or not."

R. Crush became the purchaser of the allotments numbers 215, 246, and 246a, subject to the conditions of sale.

The final award of the commissioners, which is dated the 5th of July, 1871, was confirmed on the 21st of the same month, and under it the above-mentioned allotments numbered 215, 246, and 246a respectively, were allotted to J. A. Hardcastle, and by him conveyed to R. Crush on the 29th of November, 1871, by a deed describing them by their boundaries and granting them with the appurtenances and free from all incumbrances by the grantor.

It was proved in evidence that there were other means of access to the lands of the defendant (though not so convenient as to some portion) than those now claimed by him, and it was found as a fact that they were not ways of necessity. It was also admitted that proper notices of the meetings of the commissioners for the purpose of hearing objections to the proposed award had been published, and that these meetings had been held after the

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defendant had become the owner of the lands purchased by him of J. A. Hardcastle in the manner above mentioned; that the defendant omitted to take the proper steps then or subsequently to have the trackways now claimed by him set out upon the map forming part of the award of the commissioners, and that the map or plan was published and finally confirmed without these trackways or any of them being set out upon it.

The county court judge decided in favour of the plaintiffs assessing the damage at 10*l.* The question was whether, upon the facts stated, the judgment of the county court judge was right.

The Exchequer Division being equally divided in opinion, the judgment of the county court judge in favour of the plaintiffs stood unreversed. The Exchequer Division gave the defendant special leave to appeal.

The defendant appealed.

May 30. *Crome*, for the plaintiffs. There is a preliminary objection to the hearing of this appeal. The case for the opinion of the Court is stated under s. 14 of 13 & 14 Vict. c. 61. The appeal to the superior Court under that section was final. By s. 45 of the Judicature Act, 1873, all appeals from petty or quarters sessions, from a county court, or from any inferior Court, which might have been brought to any Court whose jurisdiction is transferred to the High Court of Justice, may be heard and determined by divisional courts, and the determination of such appeals shall be final unless special leave to appeal shall be given: then by s. 20 of the Appellate Jurisdiction Act, 1876, where by any Act of Parliament it is provided the decision of any Court, the jurisdiction of which is transferred to the High Court, is to be final, an appeal shall not lie. This section impliedly repeals the power to give leave to appeal contained in s. 45 of the Judicature Act, 1873, and as under 13 & 14 Vict. c. 61, s. 14, the appeal from the county court is final, no appeal lies to this Court from a divisional court.

Philbrick, Q.C., and *Tindal Atkinson*, for the defendant. Under s. 45 of the Judicature Act, 1873, if leave be given to appeal, a right of appeal exists. Sect. 20 of the Appellate Jurisdiction Act, 1876, refers to the right to appeal given in s. 19 of the Judica-

ture Act, 1873, and leaves s. 45 untouched. Sect. 20 means that when by the previously existing state of the law a decision of a superior Court was final, there shall be no appeal from a divisional court unless there is a power to allow an appeal; but s. 45 contains such a power, therefore leave being given the decision of the divisional court is not final, and the right to appeal is therefore not taken away.

BRETT, L.J. It seems to me that the appeal lies. Where there was an appeal from the county court under s. 14 of 13 & 14 Vict. c. 61, under that section the decision of the superior Court would be final, and if so s. 20 of the Appellate Jurisdiction Act would have prevented any further appeal. But s. 45 of the Judicature Act, 1873, modifies the County Court Act, and gives a further appeal when the County Court Act says there shall be no appeal. It repeals that part of the County Court Act which said the decision of the superior Court shall be final, and says it shall be final "unless special leave to appeal from the same to the Court of Appeal shall be given." In 1876, therefore, when the Appellate Jurisdiction Act, 1876, passed, the statutory provisions with regard to appeals from county courts were these: that the decision of the divisional court was final unless leave to appeal was given. How, then, is s. 20 of the Appellate Jurisdiction Act to be read? It is to be read "where by enactment existing at the time this Act is passed, it is provided that the decision of the High Court is to be final, there shall be no appeal." That does not apply to the present case, because leave to appeal has been given, and where leave is given the decision is not final.

COTTON, L.J. Some difficulty appears to be caused by s. 20 of the Appellate Jurisdiction Act, 1876. Section 45 of the Judicature Act, 1873, was intended to modify the enactments with regard to appeals under the County Court Acts. Appeals which were final under those Acts continued to be final unless leave to appeal was given. Then came s. 20 of the Appellate Jurisdiction Act, 1876, which enacted where by Act of Parliament it is provided that the decision is to be final an appeal shall not lie: but by s. 43 special leave to appeal may be given; in that case the decision of the

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divisional court is not final. I am of opinion that we are bound to entertain the appeal.

THESIGER, L.J. I have no doubt whatever in this case. The question is whether s. 20 of the Appellate Jurisdiction Act, 1876, has repealed in part s. 45 of the Judicature Act, 1873. In the first place s. 20 does not apply only to appeals from county courts; it is a general enactment, and we cannot make a general provision repeal a particular section. The mode in which it is said s. 20 ought to be read requires the insertion of words which are not in the Act—it would have to be read: "where by Act of Parliament prior to the existence of the Judicature Acts it is provided;" but those are not the words of the section, they are "where by Act of Parliament it is provided." The Judicature Act, 1873, is a separate enactment, and at the time the Appellate Jurisdiction Act, 1876, was passed there was an Act of Parliament by which it was provided that the decision of the High Court should not be final, but that there should be an appeal if leave were given. I read s. 20 as meaning where by any statute existing at the time when the Act of 1876 was passed it was declared that the decision of a divisional court should be final, there should be no appeal; the present case does not fall within that interpretation of the section: and it follows that there is an appeal.

The appeal was then heard on the merits.

Croome, for the plaintiffs.

Philbrick, Q.C., and *Tindal Atkinson*, for the defendant, cited *Grubb* v. *The Inclosure Commissioners.* (1)

The arguments sufficiently appear in the judgment (2).

Cur. adv. vult.

(1) 30 L. J. (C.P.) 155.

(2) By 8 & 9 Vict. c. 118, s. 16: "That for the purposes of this Act the persons interested in land subject to be inclosed under this Act, or otherwise subject or to become subject to the provisions of this Act, shall be deemed to be the persons hereinafter mentioned and no others: (that is to say) the persons who shall be in the actual possession or enjoyment of any such land or any part thereof, or any common or common right thereon, or any manor of which such land or any part thereof shall be waste, or who shall be in the actual receipt of the rents and profits of such

July 2. The judgment of the Court (Brett, Cotton, and Thesiger, L.JJ.) was delivered by

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THESIGER, L.J. The question to be decided upon the appeal is, whether the defendant is entitled to certain rights of way claimed

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land or part thereof, common, common right, or manor respectively (except any tenant for life or lives, or for years, holding under a lease or agreement for a lease on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof and except any tenant from year to year, at will, or sufferance), and that without regard to the real amount of interest of such persons; and in every case in which any such land, common or common right, or manor shall have been leased or agreed to be leased to any person or persons for life or lives or for years, by any lease or agreement for a lease in which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and in every case in which any such land, common or common right, or manor shall be in the possession of a tenant from year to year at will or sufferance, or shall have been leased or agreed to be leased for a term which shall not have exceeded fourteen years from the commencement thereof, the person who shall for the time being be entitled to the said land, common or common right, or manor in reversion, immediately expectant on the term created or agreed to be created by such lease or agreement for a lease, respectively, or subject to the tenancy from year to year at will or sufferance, shall be deemed for the purposes of this Act to be the person interested as aforesaid, in respect of such land, common or common right, or manor; and in every case in which any such land, common or common right, or manor as aforesaid shall have been leased or agreed to be leased to any person for life or lives or for years, by any lease or agreement for a lease in which a rent less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall, for the time being, be in the actual receipt of the rent reserved upon such lease or agreement for a lease, shall jointly with the person who shall be liable to the payment of such rent of such land, common or common right, or manor, be deemed for the purposes of this Act to be the person interested in respect of such land, common or common right, or manor, respectively." . . .

By s. 68, the valuer acting in the matter of any inclosure shall and may set out such private or occupation roads and ways through the lands to be inclosed as he shall think requisite for the use of the persons interested in such lands or any of them; and any expenses which the valuer may incur relative to the setting out or formation or completion of such private roads and ways or any of them shall, unless the valuer shall otherwise direct, be paid in the same manner as the other expenses of the inclosure; and such expenses of the formation and completion of such private roads and ways as the

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by him over land belonging to the plaintiffs. Both parties derive title from a Mr. Hardcastle, who previously to the year 1869 was seized of lands and hereditaments in the parishes of Writtle and Roxwell, in the county of Essex. In these parishes there were certain waste lands, for the inclosure of which proceedings under the General Inclosure Act had been going on for some time before 1869, and under which it was contemplated that Mr. Hardcastle, in respect of his ownership of the lands and hereditaments above referred to, would receive allotments. In that state of circumstances Mr. Hardcastle caused some of his lands and hereditaments to be put up for sale by auction expressly reserving the allotments to be made to him of the waste lands. At the sale the defendant became the purchaser of some of the lots, which were conveyed to him by two deeds dated the 29th of September, 1869. Each of such deeds, after setting out the parcels by proper description and abuttals, proceeded as follows:—[The Lord Justice read the general words contained in the deed.]

Between the lands conveyed to the defendant and the high road to Roxwell some slips of land, forming part of the waste lands to be inclosed, were interposed, and over them there were trackways which had been used by the owners and occupiers of the property conveyed to the defendant for upwards of forty years, as a means of access to and from part of the said property and the high road, and which were used by the defendant without dispute down to the time of the award under the Inclosure Act, which was provisionally made on the 5th of July, and confirmed on the 21st of July, 1871. In the meantime, that is to say, on the 14th of July,

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valuer shall direct shall be borne by, and after the formation and completion of such private roads and ways the same shall be maintained and kept in repair by and at the expense of the owners and proprietors for the time being of the land inclosed or such of them and in such shares and proportions and in such manner as the valuer shall direct; and after such private roads and ways shall have been set out and made, the grass and herbage arising thereon shall for ever belong to and be for the use of such persons interested in the lands to be inclosed as the valuer shall direct, and in the absence of such direction shall belong to the proprietors of the land to be inclosed which shall next adjoin the roads and ways on either side thereof as far as the crown of the road; and after such setting out as aforesaid all private or occupation roads or ways over, through, and upon the lands to be inclosed which shall not be set out as aforesaid shall be for ever stopped up and extinguished.

1870, Mr. Hardcastle caused the allotments intended to be made to him to be put up to auction, and R. Crush, under whom the plaintiffs' claim title as devisees, became the purchaser of three of the allotments subject to the conditions of sale, and such allotments were conveyed to him by Mr. Hardcastle on the 29th of November, 1871. The inclosure award, while setting out as appears by the plan attached to the award certain ways over the lands inclosed, did not set out any ways over the said allotments purchased by Crush; and on the part of Crush and the plaintiffs it was contended that by virtue of s. 68 of 8 & 9 Vict. c. 118, any rights of way which might have existed prior to the confirmation of the award were from that time extinguished. The defendant, on the other hand, contended that the trackways to which reference has been made were not affected by the award, at least between him and the persons claiming under Hardcastle; and having entered on the plaintiffs' allotments in assertion of his alleged rights of way an action of trespass was brought by the plaintiffs in the county court of Essex.

The learned judge of the county court decided in favour of the plaintiffs and gave judgment for them; and upon appeal to the Divisional Court of Exchequer, the Court being equally divided in opinion, the judgment stood. We have come to the conclusion that such judgment was right and should be affirmed. Our reasons may be stated as follows. In the first place, it appears to us that the plaintiffs' right to have their allotments free from any ways not set out by the inclosure award would be, if they did not derive title from Hardcastle, tolerably plain. It is urged on the part of the defendant that the section above referred to only enables the valuer acting in the matter of any inclosure to set out private ways for the use of persons obtaining allotments under such inclosure, and that the section, while it can give no ways to other persons, can take no rights of way from them. There is no doubt that the words "for the use of the persons interested in such lands or any of them," which are found in s. 68, when coupled with the definition of persons interested in land subject to be inclosed under the Act given in s. 16, create some difficulty in the construction of the first-mentioned section; but, on the other hand, the very object which the Act has in view, and the

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means given by the Act for carrying that object into effect, point to the words at the end of s. 68 as having been used in the wide sense which their natural signification imports. The main object of the Act, as its preamble recites, is to facilitate the inclosure and improvement of commons and other lands, subject to rights of property which obstruct cultivation and the productive employment of labour. That object is effected, speaking generally, by schemes of inclosure under which rights of property are extinguished and the land freed from them is allotted, and it would be manifestly inconvenient if all rights of way could not be dealt with by the valuer intrusted with the inclosure scheme. When the provisions of the Act are looked at, it appears that the valuer's powers in respect of rights of property are intended to be of the most ample kind. Sect. 46 provides that the valuer shall hold meetings for the examination of claims and otherwise in the matter of the inclosure; s. 47 provides that all persons claiming "any common or other right or interest, or any land proposed to be inclosed," shall deliver such claim in writing to the valuer; and s. 106 provides for the making of allotments in full bar of, and satisfaction and compensation for, lands, rights of common, and all other rights and properties whatsoever, not excepted by the Act or the award, and concludes by enacting "that from and immediately after the confirmation of the award by the commissioners, or at such earlier time as the valuer, with the approbation of the commissioners, shall by notice on the church door direct, all rights of common, and all rights whatsoever by the inclosure intended to be extinguished, belonging to or claimed by any person whomsoever in or upon such lands shall cease, determine, and be for ever extinguished." These sections shew the general character of the valuer's powers as regards rights of property in or upon the land to be inclosed, and indicate an intention to give him complete control over all rights not specifically excepted. But as regards ways, both public and private, there are further provisions. Sect. 62 enables the valuer to set out and make public ways over the land to be inclosed, and to stop up, divert, or alter any existing ways passing through such land, subject, in respect of turnpike roads, to the consent of the majority of the trustees, and in respect of other public roads

to the giving of certain notices and to an appeal to quarter sessions, for which provision is made in ss. 63 and 64. As regards public ways, therefore, there is no exception from the jurisdiction of the valuer. No reason can be suggested why his jurisdiction should not be equally wide in the case of private ways. Sect. 68 then provides that the valuer "may set out such private or occupation roads and ways through the land to be inclosed as he shall think requisite for the use of the persons interested in such lands or any of them." Stopping at these words, I think that they may fairly be read as including, under the expression "persons interested in such land," persons who might under s. 47 claim any common or other right or interest in the land to be inclosed, and that those words are wide enough to include persons in the position of the defendant claiming rights of way over the land. This view is strengthened by the concluding words of s. 68, which are these: "And after such setting out as aforesaid, all private or occupation roads or ways over, through, or upon the lands to be inclosed which shall not be set apart as aforesaid shall be for ever stopped up and extinguished." But whatever doubt may exist as to the proper construction to be put upon the earlier part of the section, the later words which have been quoted indicate so strongly the intention to include (to use the very words themselves) "all private ways," that we cannot read them in any other sense, especially when the à priori reason of the thing is consistent with the sense.

We are of opinion, therefore, that the rights of way in dispute would have been extinguished, apart from any consideration of the fact that the plaintiffs derive their title through Hardcastle.

Does, then, that fact alter the position of matters? We think not. It is said that Hardcastle granted those rights of way by the conveyance of the 29th of September, 1869, and that neither he nor those who claim under him can derogate from his grant. But in the first place it is to be observed that at the date of the conveyance Hardcastle was not the owner of the servient tenement, and could not therefore, in a legal sense, grant the easements in question, although he might convey, and did convey his land to the defendant with all such rights of way, as against third persons, as he himself possessed. But even if he had been the

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owner of the soil of the wastes, over which the trackways ran, we can see no reason why he should be precluded from setting in motion the proceedings under the Inclosure Act, with the view of obtaining an allotment of the land freed from all rights of way or other rights over it, any more than an owner of the wastes, a stranger to the deed, but who must be presumed by himself or his predecessors to have granted the rights of way, would by reason of his grant be precluded from so doing. The Act itself presupposes mutual rights and obligations which, as between the owners of the soil of the land to be inclosed and the owners of rights in or over the land, might be enforced, and the very object of the Act is to establish a machinery by which those rights and obligations may be extinguished, due regard being had by the valuer in his award to the claims of the persons interested. While, therefore, the fact of a particular person having specially and for good consideration granted a way might afford reason for the valuer not interfering with the way so granted, or for giving due compensation in the shape of another way, or an allotment of land, as the case might be; it could not, in our opinion, have any further effect so far as the Act of Parliament is concerned, and could not legally or equitably be a bar to the grantor's setting in motion proceedings of a quasi judicial character, in which the grantee if he pleased might be represented and might duly protect himself.

But, further, we think that when Mr. Hardcastle, upon the sale to the defendant, reserved the allotments to be made to him, he reserved all the rights which the Inclosure Act in respect of such allotment might give him. Sect. 84 provides for such a case by enacting that "it shall be lawful for any person entitled to any allotment to sell, dispose of, or convey the estate in right of which he may be entitled to such allotment separate from and retaining to himself such allotment or the right thereto." Surely when the right to an allotment is reserved, the person in whose favour the right is reserved must be intended to preserve, with the right, everything which by the Act is included in that right; and if so, the power through the medium of the valuer to extinguish ways, being one of the things included in the right, that power is reserved.

We are of opinion, therefore, that the ways in dispute have been

legally extinguished; that the defendant, in asserting by entry his right to use them, was a trespasser, and that the learned county court judge properly entered the verdict and judgment for the plaintiffs.

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Appeal dismissed.

Solicitors for plaintiffs: *Duffield & Bruty.*
Solicitor for defendant: *Scarlett, for Jones & Scarlett.*

[IN THE COURT OF APPEAL.]

March 1.

BOWYER *v.* STANTIAL AND OTHERS.

Church—Ecclesiastical District—Incumbent—Burial Fees—Cemetery.

A cemetery company were incorporated by a local Act, and by one section it was enacted that "upon the interment of every person within the consecrated part of the said cemetery who shall appear by the books of the company to have been removed for the purpose of interment from" certain parishes including C., "the said company shall pay unto the incumbent for the time being of the church or chapel of the parish, or other ecclesiastical district or division of the parish, from which such person shall be so removed" certain fees. By another section "every such incumbent shall pay to the churchwardens or chapelwardens for the time being of his church or chapel" out of the fees received by him certain amounts, "to be respectively paid and applied by them in the same manner and amongst the same persons (including the incumbents of such churches and chapels) and in the same proportions as the fees on interments, which the said churchwardens and chapelwardens are entitled to receive in their respective parishes, districts, or divisions of parishes, are and ought by law or custom to be paid and applied." The plaintiff was the rector of C., and the defendants were respectively the incumbents of three ecclesiastical districts originally comprised within the limits of C.: none of them were in existence at the time of passing the local Act. For some years previous to the establishment of the cemetery the churchyard of C. was used as a place of interment of persons dying within the parish, and the rector of C. for the time being was entitled to all fees arising or accruing in respect of such interments. The plaintiff, as rector of C., claimed to recover against the defendants respectively the fees for the interment of persons removed from the ecclesiastical districts, of which they respectively were incumbents:—

Held, affirming the judgment of the Exchequer Division, that the defendants were entitled to the fees claimed by the plaintiff.

Vaughan v. *South Metropolitan Cemetery Co.* (1 J. & H. 256; 30 L. J. (Ch.) 265) followed.

SPECIAL CASE stated pursuant to a judge's order on an interpleader issue.

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BOWYER v. STANTIAL.

The Rev. F. W. A. Bowyer was rector of the parish of Clapham, and had been entitled to all dues and fees accruing and appertaining to the rector or incumbent of the parish of Clapham since the 25th of February, 1872. The Rev. Dr. Stantial was the incumbent of the ecclesiastical district of St. John, the Rev. A. C. Price was the incumbent of the ecclesiastical district of St. James, and the Rev. G. Forrester was the incumbent of the ecclesiastical district of St. Paul. The districts of St. John, St. James, and St. Paul were wholly comprised within the limits of the parish of Clapham, as it existed at the time of the passing of 6 & 7 Wm. 4, c. cxxix. (1), which incorporated the South Metropolitan Cemetery Company. The several incumbents of St. James's and St. Paul's had been entitled to all dues and fees accruing or appertaining to the incumbents of those districts respectively since the 25th of February, 1872. The incumbent of St. John's had been entitled to all dues and fees accruing or appertaining to the incumbent of the district since the 13th of January, 1875. In pursuance of the provisions of 6 & 7 Wm. 4, c. cxxix, the South Metropolitan Cemetery Company established and maintained a cemetery at

(1) By 6 & 7 Wm. 4, c. cxxix., s. 18, "upon the interment of every person within the consecrated part of the said cemetery who shall appear by the books of the company to have been removed for the purpose of interment from the parish in which the cemetery shall be situated, or from any parish in the county of Surrey adjoining thereto," or from certain other parishes, "the said company shall pay unto the incumbent for the time being of the church or chapel of the parish or other ecclesiastical district or division of the parish, from which such person shall be so removed, the fees following (that is to say) in case such person shall be interred within any vault, catacomb, or brick grave, the fee of twenty shillings, and in case such person shall be interred in the open ground the fee of seven shillings and sixpence.

Sect. 22: "Every such incumbent shall pay to the churchwardens or chapelwardens for the time being of his church or chapel out of every sum of twenty shillings that he shall receive by virtue of this Act in respect of interments in any vault, catacomb, or brick grave in the said cemetery the sum of twelve shillings, and out of every sum of seven shillings and sixpence in respect of interments in the open ground of the said cemetery the sum of three shillings and sixpence, to be respectively paid and applied by them in the same manner and amongst the same persons (including the incumbents of such churches and chapels) and in the same proportions, as the fees on interments, which the said churchwardens and chapelwardens are entitled to receive in their respective parishes, districts, or divisions of parishes, are and ought by law or custom to be paid and applied."

Norwood in the county of Surrey, and a part thereof was set apart for the interment of the dead according to the rites and usages of the United Church of England and Ireland, and was duly consecrated for that purpose by the bishop of the diocese. The parish of Clapham is a parish in the county of Surrey adjoining the parish in which the cemetery is situated within the meaning of the 18th section of the Act above-mentioned. For some years previous to the establishment of the cemetery, the churchyard of the parish church of Clapham was used as a place of interment of persons dying within the parish, and the rector or incumbent of Clapham for the time being was entitled to all fees arising or accruing in respect of such interments, excepting as hereinafter mentioned. None of the districts of St. John, St. James, or St. Paul were in existence at the date of the passing of the Act.

The chapel or church of St. James was originally set apart from the parish of Clapham by deed dated the 5th day of November, 1829. This deed contained a power to the trustees of the chapel or church therein appointed to sell vaults or pieces of ground lying or being in or under the said chapel or church for private places of interment for a price, not less than would at the time of such sale have been payable to the rector of Clapham for the time being upon similar sales of vaults or pieces of ground in the parochial cemetery. And it was thereby declared that the trustees should stand possessed of the purchase-moneys thereof, upon trust to pay to the rector of Clapham for the time being the sum he would be entitled to receive for the sale or grant of a similar vault or parcel of ground in the parochial cemetery for the time being of the parish of Clapham, to retain the surplus for the discharge of a certain debt upon the church, and to pay over the residue, if any, to the minister thereof for his own absolute use and benefit. The deed further provided that on every funeral which should take place at or within the chapel the rector of the parish church of Clapham, and also the clerk and sexton thereof respectively for the time being, should be entitled to the same dues and fees, as they would respectively have been entitled to, in case such funeral had been performed at or within the parish church or the parochial cemetery thereunto belonging, and the surplus, if any, of the dues or fees, which should be received upon

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every such funeral, should belong to the minister, clerk, or sexton for the time being of the chapel respectively. The deed contained similar provisions in respect of the rights of the rector of Clapham for the time being to dues and fees for every monumental stone or slab or other erection, which should from time to time be erected, set up, or fastened within the chapel. And it was further provided that proper entries of all burials, which should take place at the chapel, should be made by the minister thereof for the time being as well in the parochial register-book as in the register thereinbefore directed to be kept in the vestry-room of the chapel. The chapel of St. Paul was built in pursuance of a private Act of Parliament (53 Geo. 3, c. lxxxvi.), and by s. 18 thereof it was provided that "nothing herein contained shall extend, or be construed to extend, to affect or prejudice the right, title, interest, claim, or demand of the rector of the said parish for the time being of, in, and to any Easter offering, oblations, surplice fees, fees for burials, or vaults, or monuments in the said chapel, or other ecclesiastical rights, dues, benefits, or advantages whatsoever arising within the said parish and belonging to the said rector for the time being; but the same shall continue in such and the same manner, as they would or ought to have done in case this Act had not been passed."

The district of St. John was constituted by Order in Council dated the 2nd of November, 1842, the district of St. James by Order in Council dated the 8th of June, 1854, and the district of St. Paul by Order in Council dated the 30th of April, 1861. By these Orders in Council it was respectively provided that marriages, baptisms, and churchings should be solemnized and performed in the chapel or church of each of the said districts respectively; and that the fees arising therefrom should be received by the minister or incumbent for the time being of the chapel or church. No mention of burial fees was made in the Orders in Council, nor has any burial ground ever been attached to any of the districts. From the time of the creation of the districts to the 25th of February, 1872, all fees for burials payable under the 18th section of 6 & 7 Wm. 4, c. cxxix. in respect of persons removed for the purpose of interment from the several districts before mentioned were paid to the rector of Clapham for the time

being, excepting so far as above mentioned. At the time of passing 6 & 7 Wm. 4, c. cxxix. there were in existence certain ecclesiastical districts or divisions of the parishes referred to in s. 18 of that Act, to which burial grounds were attached, and the incumbents of which were duly entitled to solemnize and perform burials in the district: for instance, the burial fees received in respect of interments in the vaults and churchyard of the district of St. Matthew, Brixton, were paid to the churchwardens for the time being of the said district church, and some fixed part thereof was paid over to the rector for the time being of the parish of St. Mary, Lambeth, out of which the district was formed, and the residue thereof was applied partly in payment of the surplice fees of the incumbent for the time being of the district of St. Matthew and in payment of the fees of the clerk and sexton of the district church. It was agreed that the fees payable under the 18th section of 6 & 7 Wm. 4, c. cxxix., since the 25th of February, 1872, and up to the 31st of December, 1876, in respect of persons removed for the purpose of interment from the districts of St. John, St. James, and St. Paul amounted to 66*l.*, 92*l.* 7*s.* 6*d.*, and 125*l.* 17*s.* 6*d.* respectively.

The question for the opinion of the Court was whether the plaintiff, as the rector of Clapham, was entitled to all, or any, and which of the several sums of 66*l.*, 92*l.* 7*s.* 6*d.*, and 125*l.* 17*s.* 6*d.*, as against the defendants, being the incumbents of the several ecclesiastical districts respectively.

The Exchequer Division gave judgment for the defendants, upon the authority of *Vaughan* v. *South Metropolitan Cemetery Co.* (1)

The plaintiff appealed.

Meadows White, *Q.C.*, and *Kenelm E. Digby*, for the plaintiff.

A. Charles, *Q.C.*, and *Bullen*, for the defendants.

The arguments are sufficiently stated in the judgments. The following cases were cited: *Anonymous* (2); *Topsall* v. *Ferrers* (3); *Burdeaux* v. *Lancaster* (4); *Gilbert* v. *Buzzard* (5); *Spry* v. *Gallop* (6); *Bryant* v. *Foot.* (7)

(1) 1 J. & H. 256; 30 L. J. (Ch.) 265.
(2) 2 Show. 184.
(3) Hob. 175.
(4) 1 Salk. 332.
(5) 3 Phillim. 360.
(6) 16 M. & W. 716.
(7) Law Rep. 3 Q. B. 497.

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BRAMWELL, L.J. In my opinion this judgment must be affirmed. I have felt great hesitation during the argument, but I wish to give the following reasons for the conclusion at which I have arrived.

The Act of the South Metropolitan Cemetery Company was drawn in such a way as to raise doubts whether it applied to future as well as to then existing ecclesiastical districts, and also whether it applied to those ecclesiastical districts which had not, as well as to those which had, graveyards. Upon a review of the statute it does not seem unreasonable to suppose that the legislature intended it to extend to future ecclesiastical districts. It may at first sight appear strange that the incumbent of a new ecclesiastical district should participate in the fees payable under the Act, but the answer seems to be that the incumbent would be entitled to his share under the words of s. 18; if district B. is formed out of parish A., then by force of the words of s. 18 the South Metropolitan Cemetery would have to pay district B. for the loss sustained; and if this provision is reasonable as to existing districts, it will be so for future. Further, I do not think it unreasonable that the statute should apply to future districts without graveyards; why should not the incumbent of a future district have a share in the fees as well as the incumbent of an existing district? In point of fact, neither does any work or service to entitle himself to it, although one of them might; it is not a case of vested interest. I see no greater reason why the one should be paid merely because he has the means of doing the work rather than the other who has not the means of performing it. The legislature may have thought it right to put them upon an equality and to make no difference between their emoluments. By its terms s. 18 applies both to districts to be thereafter created and to districts without graveyards: is its effect cut down by s. 22? It is somewhat difficult to understand the effect of this latter section; it cannot be pushed to its full extent, and I think that it must have been framed under an erroneous notion. The clear words of s. 18 cannot be cut down by the doubtful language of s. 22, and I agree with the counsel for the defendants that we ought not to differ from the decision in *Vaughan* v. *South Metropolitan Cemetery Co.* (1)

(1) 1 J. & H. 256; 30 L. J. (Ch.) 265.

which appears to have remained unimpeached for the space of seventeen years.

BRETT, L.J. The question before us is, whether the fees payable by the cemetery company are by force of their Act due to the rector of Clapham or to the incumbents of the ecclesiastical districts, and it is the same as that which arose in *Vaughan* v. *South Metropolitan Cemetery Co.* (1) Apart from the statute, I think that as between the rector and the incumbents burial fees ought to be paid to the rector and not to the incumbents. But then the words of s. 18 are clear, and work no injustice; the section points to events which might happen after the passing of the Act: a parish might afterwards be divided into districts, some of which might have, and others might not have, graveyards attached to them. The parish in respect of which the fees are to be paid is the parish, from which the body is removed for the purpose of interment; but then s. 18 enjoins in the plainest terms that the fees shall be paid to the incumbents of the ecclesiastical districts or divisions, if these have been formed out of the parish. It has been argued that this construction would work manifest injustice to the rector of Clapham. Where the words of a statute are clear, it is, as it seems to me, no argument against the interpretation of them in their ordinary meaning, that they are productive of injustice; but however that may be, as I have before intimated, I see no injustice in the construction which we propose to adopt.

It has been argued that by the cemetery company's Act the rector of Clapham is deprived of the opportunity of earning burial fees; I agree with the view of the present Lord Hatherley, then Vice-Chancellor Wood, in *Vaughan* v. *South Metropolitan Cemetery Co.* (1), that this argument is not sustainable. A clergyman has to perform duties throughout his parish and at all times of the year; the right to receive a fee for the performance of part of those duties is capable of being supported by custom; but still he is bound to perform them; can it be said to be contrary to natural justice, that when an ecclesiastical district is formed out of a

(1) 1 J. & H. 256; 30 L. J. (Ch.) 265.

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parish, the duties of the rector or vicar over it should be taken away from him and transferred to another person? At all events, when the district is formed, the reason for compensation goes. There is nothing in s. 22, which shews by necessary implication that it was inconsistent with s. 18. I agree with Lord Hatherley that it is unnecessary to confine the operation of the latter section.

COTTON, L.J. I am of opinion that the cemetery company were bound to pay the fees in dispute to the defendants. There is in reality nothing to confine the statutes to existing districts; the legislature had in contemplation the breaking up of large parishes, and I do not think it a fair construction to adopt the view urged on behalf of the plaintiff; we must be guided by the words used. When the words of a statute are of doubtful meaning we may consider what result the legislature probably intended, and may adopt that construction which seems best to support it; but there is no obscurity in s. 18, and the argument cannot prevail that it applies only to existing districts. It has been argued that the legislature intended to compensate the rector of Clapham for the discontinuance of the fees accruing to him from burials in the churchyard of the parish; s. 18 does not state in express terms that the rector was entitled at the passing of the Act to be paid fees for performance of the burial service at the churchyard of the parish, although in point of fact he might be so. The legislature probably had in view the inability of the churchyard to provide for the interment of the parishioners, and although it gave the rector certain fees to be paid by the cemetery company, yet it made a bargain with him that whenever an ecclesiastical district should be formed, the fees due in respect of the burial of persons removed from that district should be paid to the incumbent thereof. I think this the proper construction of the language used by the legislature. Taking this view of the enactment we get rid of the argument as to compensation. I will mention s. 22, which has been relied upon by the plaintiff's counsel; as it is framed, it assumes that churchwardens and chapelwardens were entitled to receive fees; but I do not think it necessary to put a construction

upon it; in any point of view it does not seem applicable to every case; and at all events it does not enable us to say that it applies to the present case, and overrules the clear words of s. 18.

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Judgment affirmed. (1)

Solicitors for plaintiff: *Paterson, Snow, Burney, & Bloxam.*
Solicitors for defendants: *Lovell, Son, & Pitfield.*

[IN THE COURT OF APPEAL.]

June 28.

WILLCOCK *v.* TERRELL.

Practice—Writ of Sequestration—Order by Judge to pay Judgment Debt by Instalments—Pension granted for past Services—County Courts Act (15 & 16 *Vict. c.* 54), *s.* 15—*Rules of the Supreme Court*, 1875, *Order XLVII.—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

Judgment having been obtained against a county court judge for a large sum, a judge's order, under the Debtors Act, 1869, s. 5, was made for payment of the judgment debt by quarterly instalments of 50*l.* each on days named. Default being made in the payment of some of these instalments, and there being no other means of enforcing obedience to the order, writs of sequestration were issued under Order XLVII. of the Rules of the Supreme Court, 1875.

The debtor having resigned his office, a pension of 1000*l.* per annum was granted to him under 15 & 16 Vict. c. 54, s. 15, charged upon and payable out of the Consolidated Fund:—

Held, affirming the decision of the Exchequer Division, that this pension, being a reward for past services only, was liable to seizure under the writs of sequestration; and the Court, at the instance of the judgment creditor, made an order to restrain the debtor from receiving the quarterly payments, and impowering the sequestrators to receive the same, to the extent of the moneys due and payable under the judge's order.

On the 26th of April, 1872, the plaintiff recovered a judgment in the Court of Exchequer against the defendant for 1629*l.* 4*s.*

By indenture of the 18th of August, 1872, made between the defendant of the one part and the plaintiff of the other part, the defendant covenanted to pay to the plaintiff on the 31st of July, 1872, the said sum of 1629*l.* 4*s.* and interest at 4*l.* per cent., from the 26th of April, 1872, and assigned to the plaintiff by way of security certain policies of insurance. The deed contained a

(1) See *Cronshaw* v. *Wigan Burial Board*, Law Rep. 8 Q. B. 217.

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covenant that, if the defendant should pay the interest quarterly on the days mentioned, and 100*l.* on the 30th of April, 1874, and 100*l.* on every succeeding 31st of July, 31st of October, 31st of January, and 30th of April, until the judgment debt and interest thereon should be paid, and if the policies should be duly kept up, the plaintiff would not, during the life of the defendant, call in or enforce the payment of the 1629*l.* 4*s.* or interest, or any part thereof. The deed also provided that, if and whenever default should be made in the payment of any interest or instalment, or any part thereof, it should be lawful for the plaintiff to enforce payment of the judgment debt by any means he might deem expedient.

The defendant failed to pay the instalments as provided by this deed; and on the 8th of February, 1876, an order was made by Denman, J., on the application of the plaintiff, for payment of 1612*l.* 19*s.* and interest (being the amount then due upon the judgment) by quarterly instalments of 50*l.*, on 10th of April, 10th of July, 10th of October, and 10th of January in each year, beginning on the 10th of April, 1876. The defendant duly paid four instalments of 50*l.* each in pursuance of the order, but failed to pay the fifth, which became due on the 10th of April, 1877.

On the 22nd of May, 1877, an order was made by Denman, J., that the defendant, for default in payment of the fifth instalment of 50*l.*, be committed to prison for six weeks from the date of his arrest, or until he should pay that sum, with 24*l.* 8*s.* the costs of the order, and sheriff's fees for the execution thereof. This order was lodged with the sheriff of Breconshire, who was unable to execute it, the defendant, when not on circuit and in the actual discharge of his public duties as a county court judge and thus privileged from arrest, keeping out of the way to avoid being arrested, and having (as it was believed) now left the country. No payment had been made in obedience of the order. In December, 1877, the defendant applied to the Lord Chancellor and obtained leave to resign his office, and, pursuant to s. 15 of 15 & 16 Vict. c. 54, a pension of 1000*l.* was granted to him as from the 1st of January, 1878, payable quarterly out of the Consolidated Fund.

On the 15th of December, 1877, a writ of sequestration was

issued, whereby, after reciting the order of the 8th of February, 1876, the sequestrators therein named, or any three or two of them, were commanded "to collect, take, and get into their hands, not only the rents and profits of the real estate of the defendant, but also his goods, chattels, and personal estate, and to detain and keep the same until the defendant should pay to the plaintiff three several sums of 50*l.*, making together the sum of 150*l.*, respectively ordered to be paid on the 10th of April, 10th of July, and 10th of October, 1877, and clear his contempt."

On the 17th of December, 1877, notice of the sequestration was given to the lords of the Treasury, and they were requested to direct a portion of the defendant's pension to be paid over to the sequestrators. This they declined to do: but, upon a second application, in which they were referred to the case of *Dent* v. *Dent* (1), they intimated to the plaintiff's solicitors that no payment would be made to the defendant in respect of his pension, until the sequestrators should have had an opportunity to make an application to the Court upon the subject.

A further instalment of 50*l.* under the order of the 8th of February, 1876, became due on the 10th of January, 1878, and on the 12th another writ of sequestration was issued, notice of which was also given to the Treasury.

April 4. *Lumley Smith*, pursuant to a notice of motion, applied for an order upon "the lords of the Treasury or the paymaster general" to pay over to the sequestrators so much of the accruing pension of the defendant, as would suffice to satisfy the sums of 150*l.* and 50*l.* claimed under the writs of sequestration, with costs. The authorities are clear that, though half-pay is not attachable, a pension like this, for past services, is: see *Knight* v. *Bulkeley* (2); *Dent* v. *Dent* (1); see also 1 Daniell's Ch. Pr. 5th ed. 912–914. And the only mode of attaching it is by sequestration under Orders XLII. and XLVII. of the Rules of Court of 1875.

[LORD COLERIDGE, C.J. You have already got your writs of sequestration. How do you propose to avail yourself of them? It seems idle to call upon the paymaster general; he would not obey our order if we made one; he knows no one but his superiors,

(1) Law Rep. 1 P. & D. 366. (2) 5 Jur. (N.S.) 817.

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the lords of the Treasury. And, if we made an order upon the latter, and they did not feel themselves justified in acting upon it, how could we enforce it?]

The same course might be pursued as was adopted in *M'Carthy* v. *Goold* (1) and *Knight* v. *Bulkeley* (2), viz. by an order restraining the defendant from receiving the accruing payments on account of the pension, and impowering the sequestrators to receive them.

Finlay, for the defendant. It may well be doubted whether a writ of sequestration is the proper way of enforcing an order like this which is made under the Debtors Act, 1869 (3), the object of which is the incarceration of the debtor in the event of disobedience. In *Crispin* v. *Cumano* (4) it was held that the Court had no authority to make an order upon the Bank of England (without their assent) to pay over dividends to sequestrators. And in *Reg.* v. *The Lords of the Treasury* (5) it was held that a mandamus will not lie for a similar purpose. Process of sequestration is process of contempt; it is not one of the modes of obtaining execution pointed out by Order XLII. [Rule 3 of the Orders in Chancery of 1870 (6) was also referred to.]

Cur. adv. vult.

April 11. LORD COLERIDGE, C.J. This is an application that the Court should make an order upon the paymaster general for the sum of 50*l.* out of the quarterly payment of an annuity granted to a county court judge under the provisions of 15 & 16 Vict. c. 54. Now, there may be some difficulties, and I am of opinion that there are great difficulties, in granting the order in the form in which Mr. Smith asks for it. The case to which Mr. Finlay has referred, and to which I will refer in a moment, seems to me in its principle to go the full length for which he contends; and I should hesitate very long indeed—as I intimated on the last occasion—before I committed the Court to a contest in point of right with the Treasury.

(1) 1 Ba. & Be. 387.
(2) 5 Jur. (N.S.) 817.
(3) 32 & 33 Vict. c. 62.
(4) Law Rep. 1 P. & D. 622.
(5) Law Rep. 7 Q. B. 387.
(6) Law Rep. 5 Ch. p. xxxiv.

Now, the circumstances of the case are these:—There is a clear and undisputed debt of 1612*l.* 19*s.* due from a late county court judge to the plaintiff. For that sum a judgment has been obtained against the defendant; but there was a difficulty in the way of the plaintiff obtaining the fruits of that judgment. An order was accordingly obtained from my Brother Denman at chambers, upon production of the judgment and proof that it had not been paid off, that a sum of 50*l.* a quarter should be paid by the county court judge until the judgment should be satisfied. The county court judge having, I will not say, absconded, but it being impossible to find out where he now is, and it being impossible to enforce obedience to the order whilst he held his office, because he was only visible whilst going to or returning from his court, during which time he would be protected, and he having since he resigned his office apparently retired, so to speak, into a desert, nothing could be done to obtain the quarterly payments. Under the advice of the Lord Chancellor, a pension of 1000*l.* per annum under 15 & 16 Vict c. 54 has been granted to the late judge, payable quarterly; and the question is whether those quarterly payments or some portion thereof can be made available to satisfy the order.

Now, it seems to me that this case comes almost directly within the terms of Rule III. of the Orders of the Court of Chancery made in 1870, which by the Judicature Act is an order upon which any judge of the High Court may act; and, if there were any doubt about it, it seems to me that Order XLVII. would put it beyond all question. Rule III. provides in substance that, where any person is by an order made in any suit or motion directed to pay money in a limited time, upon default made a writ of sequestration may be issued. Here is a defendant who has been directed by an order made in a suit or matter to pay a certain sum of money in a limited time, and he has not done so; and the question is whether a writ of sequestration may issue. It seems to me that nothing has been said in the ingenious argument of Mr. Finlay, to which I have listened with great attention, to remove this case from the plain operation of the words of Order XLVII.—"Where any person is by any judgment directed to pay money into court, or to do any other act, in a limited time, and after due

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service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery." Mr. Finlay was reduced to argue that the words "any other act" must be read so as to exclude the payment of money. I am unable to see any ground for that argument. It seems to me that, if this had been anything but a pension, and if the persons to be affected were any other than the lords of the Treasury, there would have been no difficulty in the case. But I think these circumstances do introduce a difficulty, and, as at present advised I fail to see how this Court can make an order upon the paymaster general, who is a mere subordinate officer of the Treasury, to pay to the sequestrators any portion of the pension payable to the defendant as it may from time to time accrue due. In the same way, as in the case which has been referred to of costs incurred at quarter sessions, the order could not be made upon the lords of the Treasury themselves, to pay by the hand of the paymaster general. That would be open to the same objection that was taken, and successfully taken, in the case to which Mr. Finlay has referred. I therefore think that to the order in the form in which it is asked for by Mr. Smith there is an insuperable legal objection, inasmuch as, whatever I may think of the moral duties of the lords of the Treasury, I see no mode of enforcing it. Without, therefore, expressing any opinion upon the letters which have passed or the course which those persons have been advised to take, it is enough to say that we cannot make the order as prayed either against the lords of the Treasury or the paymaster general. But there is an authority, and to my mind a direct authority in the Court of Chancery in Ireland decided by Lord Manners after argument. It is the case of *M'Carthy* v. *Goold* (1), in which Lord

(1) 1 Ba. & Be. 387.

Manners directed an order to issue in the form, in which we suggested to Mr. Smith on the former occasion, that we thought an order might go in this case. There, the object was to get at a pension, which had been granted to Lord Westmeath by means of a sequestration. Lord Manners declined to make an order upon the lords of the Treasury: but he said that a pension granted to an individual for past services did not stand upon the same principles, as it had been held in *Stone* v. *Lidderdale* (1) and other decided cases that half-pay is governed by, inasmuch as the object of half-pay is to keep the recipient in a position in which his services may in future be made available for the benefit of his country; whereas, a pension granted for past services, like any other available income, is attachable for the purpose of satisfying the party's just debts. His lordship said that the pension might be reached by the process of the Court, and that the proper mode of effecting this was by an order restraining the defendant from receiving the pension, and directing service of the sequestration upon the lords of the Treasury; and the case goes on to say that the order as suggested by Lord Manners was accordingly granted.

Now, I do not see that that violates any principles of law; and it enables us to do that which is manifestly just, without committing ourselves to any conflict with any other power or jurisdiction. We are therefore willing to grant the sequestrators in this case an order in the general form suggested. Care must be taken in framing the order, because I apprehend it can only authorize the sequestrators to receive the money as and when the payments accrue; and they will probably have to apply to a judge at chambers from time to time for a fresh order, which no doubt will be granted without difficulty.

LINDLEY, J. I am of the same opinion. With reference to the first question raised by Mr. Finlay as to whether this writ of sequestration was lawfully issued, it appears to me that the writ is perfectly regular and proper. In order to determine that question, we must look at the orders now in force under the Judicature

(1) 2 Anstr. 533.

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Act, 1875, and the material one is Order XLVII., which is as follows:—[His Lordship read it.] It is said that this is not a judgment. That is quite true: but by Order XLII., Rule 20, this order is equivalent to a judgment directing the defendant to pay money at certain specified times, and appears to me to fall clearly within Order XLVII. Then it is urged that, assuming that to be so, the order of my Brother Denman requiring the money to be paid at certain fixed times is not an order, upon which a writ of sequestration can issue. Mr. Finlay says it is an order made for the purpose of sending the defendant to gaol in case of default, and cannot be used for any other purpose. That, however, seems to me to be putting much too narrow a construction (to say the least of it) upon the Debtors Act, 32 & 33 Vict. c. 62. Let us see how it would stand without that Act. I apprehend it would be competent to the Court, irrespectively of that Act, to make an order upon the defendant to pay the whole or a part of the sum specified, and that upon an order so obtained it would be competent to the plaintiff to issue a writ of sequestration. Is the order less effective because it is made under the Debtors Act? It is made in the action and in the matter of the Debtors Act. I think it is a proper case for a sequestration as well as for an attachment. The writ therefore is regular, and ought to be enforced.

Then comes the question what is to be done with it. To ascertain that we must have recourse again to Order XLVII., which regulates the practice in these matters. The order says that "such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have hitherto been dealt with by the Court of Chancery." Suppose this was a writ of sequestration issued out of the Court of Chancery, what would be the proper course? As far as my recollection serves me, the writ is in the ordinary form, directing the sequestrators to collect, take, and get into their hands, not only the rents and profits of the real estate of the defendant, but also his goods, chattels, and personal estate, and to detain and keep the same until the defendant should pay

to the plaintiff the sums ordered to be paid, and clear his contempt. Now, the first question which it is material to consider is, whether a pension can be taken under the writ at all: because, if it cannot, no order can be made upon this application. As to that, after some diversity of opinion, there is authority,—not only the Irish case to which my Lord has referred, but also the more recent case of *Dent* v. *Dent* (1),—to shew that it can.

Then, the pension being a proper subject-matter for sequestration, the only difficulty that remains is that the retiring annuity or pension of the county court judge is to be "paid out of the Consolidated Fund quarterly or otherwise as the commissioners of the Treasury may direct:" 15 & 16 Vict. c. 54, s. 15. I do not propose to make any order upon the paymaster general, or upon the Treasury: it is not the practice to do so; and there is not the slightest reason to suppose that such a step will be necessary. The form of attaching a pension like this appears to be given in *M'Carthy* v. *Goold* (2), and particularly in the case of *Knight* v. *Bulkeley* (3), cited by Mr. Smith. We may restrain the debtor from receiving so much of the pension as is appropriated by my Brother Denman's order to the liquidation of the judgment debt; and the sequestrators should be authorized to apply for and receive from the Treasury 50*l.* per quarter out of the moneys which may be in the hands of the paymaster general applicable to the payment of this pension: and it appears to me that, regard being had to the nature of the fund with which we have to deal, it may be necessary for the plaintiff to obtain a similar order as each quarterly payment becomes due, seeing that until that time the money does not become part of his goods and chattels. This application may be made at chambers. I have sketched out a form of order which I think with a little moulding will meet the requirements of the case. It should be an order restraining the defendant from receiving by himself or through his agents or bankers the moneys payable to him in respect of his pension, to the extent of the arrears now due under the deed; and directing the sequestrators to receive from the Treasury or from the paymaster general the

(1) Law Rep. 1 P. & D. 366. (2) Ba. & Be. 387.
(3) 5 Jur. (N.S.) 817.

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amount so due and in arrear: and let them apply for a fresh order at chambers for the further sums of 50*l.* as they become due. That will in substance be the proper order.

Order absolute. (1)

The defendant appealed.

May 29. *Finlay*, for the defendant.

Lumley Smith and *C. Crompton*, for the plaintiff.

The following authorities were cited in the course of the argument: as to the power to assign a pension: *Davis* v. *Duke of Marlborough* (2); *Ex parte Hawker* (3); *Innes* v. *East India Co.* (4); as to the power to commit a debtor: *Horsnail* v. *Bruce.* (5)

Cur. adv. vult.

June 28. The judgment of the Court (Brett, Cotton, and Thesiger, L.JJ.) was delivered by

COTTON, L.J. This is an appeal from an order made by the Exchequer Division at the instance of the plaintiff in the month of April, 1878. The order restrained the defendant from receiving 200*l.*, part of a pension payable to him, and ordered that the sequestrators should receive that amount out of the pension. The order was made to give effect to a writ of seques-

(1) The rule or order was drawn up as follows:—

It is ordered that the defendant be restrained from receiving, by himself or through his bankers or agents, the moneys payable to him in respect of the pension granted to him pursuant to the statute in that case made and provided on his retirement from the office of a county court judge, to the extent of 150*l.* and 50*l.*, making together 200*l.*; and that the sequestrators mentioned in the writs of sequestration mentioned herein, viz. S. B., of &c., F. J. G., of &c., E. R. C., of &c., and J. C., of &c., or any three or two of them, do receive from the Treasury, or from the paymaster general, the said sums of 150*l.* and 50*l.*, making together 200*l.*, out of the sum now payable to the defendant in respect of his said pension, and on receiving the same do pay the same to the plaintiff.

And it is further ordered that the said sequestrators, in case of further default by the said defendant in paying the instalments of the judgment debt herein pursuant to the order of the Hon. Mr. Justice Denman made herein, dated the 8th of February, 1876, may be at liberty to apply at chambers for similar orders to the present order, having relation to future sums which may from time to time become payable to the defendant in respect of his said pension.

(2) 1 Swanst. 74.

(3) Law Rep. 7 Ch. 214.

(4) 17 C. B. 351; 25 L. J. (C.P.) 154.

(5) Law Rep. 8 C. P. 378; see *Evans* v. *Wills*, 1 C. P. D. 229.

tration obtained by the plaintiff to enforce an order against the defendant obtained by him. The facts are simple. The plaintiff, before the year 1876, obtained a judgment against the defendant for a sum exceeding 1600*l*. He was unable to obtain payment, and on the 8th of February, 1876, he, under s. 5 of the Debtors Act, 1869, obtained an order, that the defendant (who was at the time a county court judge in receipt of a salary), should pay "the debt by instalments" at times in the order mentioned. The instalments in each year amounted to 200*l*. Subsequently, in December, 1877, the defendant resigned his office of county court judge, and a pension was granted to him under the provisions of the Act 15 & 16 Vict. c. 52, s. 15. The defendant made default in payment of the sums, which the order of 1876 directed him to pay, and the plaintiff issued a writ of sequestration, and afterwards obtained the order of the 11th of April, 1878.

At the time of the passing of the Judicature Act, one of the modes of enforcing orders of the Court of Chancery was by sequestration, and the General Orders made in pursuance of the Judicature Act enable orders made by any judge of the High Court to be enforced in like manner: See Order XLII. Rule 1, and Order XLVII.

It was suggested that an order for payment to a person named on a given day was not an order directing the defendant "to do any other act" within the meaning of Order XLVII.; but this in our opinion cannot be maintained. It was also contended on behalf of the defendant that the order of February, 1876, was made under the 5th section of the Debtors Act, 1869; that the subdivision of that section, under which the order was made, authorized orders for payment by instalments to be made "for the purposes of that section;" that the object of the section was to authorize a judge to commit to prison any person for making default in payment of any sum which in the opinion of the judge he was able to pay, and that it would therefore be wrong to take advantage of the order made under the section in order to give the plaintiff a means of enforcing payment which was not available for enforcing his judgment, and was not contemplated by the 5th section of the Act of 1869. In our opinion this objection

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cannot prevail. The order of February, 1876, was properly made in its present form, and although the primary object was to enable the Court or a judge to commit the defendant if he did not pay the instalments, and at the time when the Act of 1869 passed, orders made by a judge of the Common Law Courts could not be enforced by sequestration, yet as the Judicature Act has enabled orders made by any judge of the High Court to be enforced by this mode, we see no reason why the plaintiff should not avail himself of the additional mode of enforcing the order, even though it was made under an Act passed at a time when only orders made by the judges of the Court of Chancery could be enforced by sequestration.

It was urged on behalf of the defendant, that the order of April, 1878, ought not to have been made, because this Court could not enforce it, by which was meant, could not compel the paymaster general to pay to the sequestrators. It cannot. But the Court can prevent the defendant from receiving, and authorize the sequestrators to receive the sum mentioned. The order is in a form, which is usual in cases where a receiver or other officer of the court is authorized to receive a sum due from any one not before the Court.

The only remaining objection to the order raised by the appellant was that the pension granted to the defendant could not be assigned or otherwise made available for payment of his debts. Where a pension is granted by the Crown to one, who though not for the time engaged in any active duties is still liable to be called to active service, and is therefore to be considered in the service of the Crown, as the half-pay of an officer, the pension is to be considered as to some extent granted in order to maintain the grantee, until he is called on to serve again. But, as stated by Parke, B., in *Wells* v. *Foster* (1): "A man may assign a pension given to him entirely as a compensation for past services, whether granted to him for life or during pleasure." The 15th section of the Act of 15 & 16 Vict. c. 54, under which the pension was granted, says nothing as to the defendant being called on hereafter to perform any duties. In our opinion, the pension may be considered as

(1) 8 M. & W. 149, at p. 152.

granted entirely for past services, and can be made available for payment of the defendant's debt to the plaintiff.

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In our opinion, the appeal entirely fails, and must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Bolton, Robbins, & Busk, for Howell & Morgan, Machynlleth.*

Solicitors for defendant: *Elmslie, Forsyth, & Sedgwick.*

[IN THE COURT OF APPEAL.]

1877
Dec. 6.

EADE AND ANOTHER *v.* JACOBS.

Practice—Interrogatories as to Conversations with deceased Person and as to Matters of Evidence.

The plaintiffs sued as administrators to recover possession of certain hereditaments for breach of a covenant contained in a lease; the defendant alleged that the intestate verbally consented to the breach of the covenant:—

Held, that the plaintiffs were entitled to interrogate the defendant as to when the consent was given and as to the conversation which took place, but that they were not entitled to interrogate him as to the persons in whose presence the verbal consent was given.

THE plaintiffs, as administrators of Isaac Eade, sought to recover possession of certain hereditaments whereof the defendant was lessee, and alleged that they were entitled to enter for breach of the covenants contained in the lease; one of the breaches relied upon was that the defendant had during the term made certain alterations in, and additions to, the demised hereditaments without the consent in writing of the intestate or of the plaintiffs as his administrators. The defendant pleaded that the alterations and additions were made with the consent and authority of the intestate, and that he was aware that they were being made and did not object thereto, but acquiesced in and approved of the same and waived all right of forfeiture. The plaintiffs thereupon administered the following interrogatories:—

1. "At what date or dates were the alterations and additions referred to in the 4th paragraph of the defence made? Give the

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name and address of the builder or builders, or other person or persons by whom they were wholly or partially executed.

2. "When did the said Isaac Eade consent to or authorize the alterations and additions mentioned in the said 4th paragraph other than the alterations to which he consented in writing? Was the consent or authority given on more than one occasion? If so, state the times of each. Also state when and in whose presence such consent and authority, or consents and authorities, were given. State fully the conversation or conversations when such licence or consent, licences or consents, were given by the said Isaac Eade."

Hawkins, J., at chambers, ordered that the latter part of the second interrogatory should be struck out, which asked when and in whose presence the alleged consent was given, and demanded a full statement of the conversations.

The plaintiffs appealed to the Exchequer Division, where Cleasby, B., was of opinion that the order of Hawkins, J., should be affirmed, and Kelly, C.B., considered that the second interrogatory, as originally drawn, ought to be allowed.

The plaintiffs appealed to this Court.

Anderson (*A. T. Lawrence*, with him), for the plaintiffs. It is necessary that the plaintiffs should know when and in whose presence the alleged consent by the intestate was given, in order that they may have an opportunity of testing the truth of the defence; and if they are not allowed to ask the particulars of the conversations, they may be taken by surprise at the trial. The interrogatories, which the plaintiffs propose to administer, are of a very similar character to those allowed in *Hawkins* v. *Carr* (1) and *Hills* v. *Wates* (2); and since the coming into operation of the Judicature Acts the power to interrogate has been much enlarged.

Lumley Smith, for the defendant. The question is not whether, upon principle, these interrogatories ought to be allowed, but whether the discretion of the judge at chambers ought to be overruled. The cases cited in support of the argument for the plaintiffs are not in point; for the interrogatories allowed in them

(1) Law Rep. 1 Q. B. 89. (2) Law Rep. 9 C. P. 688.

related at least primarily to facts, and not merely to conversations and matters of evidence.

A. T. Lawrence, for the plaintiffs, in reply.

COTTON, L.J. The Lords Justices have requested me to give judgment. The practice formerly observed at Common Law has now come to an end. Under the Judicature Acts every party to an action has the right to administer interrogatories, but the party served with them may object to such as are scandalous, or irrelevant, or not put bonâ fide, or immaterial. The grounds, upon which an objection may be made, are pointed out in Order XXXI., Rule 5. But the onus of proof lies upon the person who applies to strike them out, and it is the primâ facie right to administer them. The question before us is whether the decision of Mr. Justice Hawkins was right; it has been argued before the Exchequer Division; if that Court had been unanimous, I should have been unwilling to entertain this appeal unless there had been an error in a matter of principle. Now I do not put my decision upon the ground that the plaintiffs are administrators, although it may sometimes happen that an executor or administrator may properly interrogate as to circumstances, which lay within the knowledge of the deceased person whom he represents. It seems to me that the interrogatories have gone too far, and also that the objections have gone too far. Looking at the practice formerly existing in the Court of Chancery, I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce. I think that the words "in whose presence" should be struck out; the defendant is not bound to give the names of the witnesses whom he intends to call at the trial. Then comes the question as to conversations. The old rule of pleading in Chancery was that conversations when relied upon as admissions must be stated in substance and effect; and this was a wholesome rule to be followed, because it prevented the opposite party from being taken by surprise. In the present case I think that only the substance of the conversations need be set forth in the answers to the interrogatories. The word "fully" must be struck out, for the plaintiffs must rest content with a fair statement. I have felt doubt whether

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the conversations fall within the line of defence as set up by the pleadings; but on the whole I think that they do; and if they do, the plaintiffs are entitled to know what they were. I think that on the whole the appeal must be allowed without any costs.

BRAMWELL and BRETT, L.JJ., concurred.

Appeal allowed.

Solicitor for plaintiffs: *Charles Gregory.*
Solicitors for defendant: *Angell & Imbert-Terry.*

Dec. 6.

[IN THE COURT OF APPEAL.]

SMITH *v.* DOBBIN.

Practice—Writ issued out of District Registry—Appearance, Notice of entering—Rules of Supreme Court, Order IV., Rule 3a, Order XII., Rule 6a, Order XIII., Rule 5a.

When a writ is issued out of a district registry and is served without the district, it is imperative that notice of appearance be sent to the address for service within the district; notice of appearance given at the address for service in London is insufficient.

THE writ of summons was issued out of the Hereford District Registry, and was indorsed "issued by Thomas Garrald of Hereford, whose address for service is Thomas Garrald, at Thomas White & Sons," London. The defendant appeared in London, and gave notice of appearance to T. Garrald at the office of Thomas White & Sons; the letter containing the notice lay at their office without being opened. The plaintiff, not having received notice of appearance within the time limited by Order XIII., Rule 5a, signed judgment. A master at chambers having ordered the judgment to be set aside for irregularity, Lopes, J., affirmed the order. The Exchequer Division having reversed the decisions of the master and Lopes, J., the defendant appealed.

Petheram, for the defendant, in support of the appeal. The defendant has done all that was required by Rules of the Supreme

Court, 1875, Order XII., Rule 6a (1). He sent notice of appearance to the address, and this was a sufficient intimation of his intention to defend the action. In any point of view the omission to send notice to Hereford was a mere irregularity, and appearance having been entered the judgment ought to be set aside. The mode of indorsement is misleading, for it induced the defendant to believe that notice of appearance was to be given in London.

A. T. Lawrence, for the plaintiff, was not called upon.

BRAMWELL, L.J. This appeal must be dismissed. It is plain that the defendant has no merits, and the plaintiff is proceeding regularly. It seems to me that the writ was correctly indorsed, and it is not disputed that if he lived within the limits of the district registry the indorsement would be sufficient. The plaintiff has added an address for service out of the district for the benefit of the defendant, who does not reside within it; but the rules require imperatively that notice of appearance shall be given at the address for service within the district. This the defendant has omitted to do and therefore he is in default. It has been contended that the judgment ought not to be set aside

(1) By the Rules of the Supreme Court, 1875, Order IV., Rule 3a: "In all cases where a writ of summons is issued out of a district registry, the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar."

Order XII., Rule 6a: "A defendant, who appears elsewhere than where the writ is issued, shall on the same day give notice of his appearance to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the district registry, or by prepaid letter directed to such address, and posted on that day in due course of post."

Order XIII., Rule 5a: "Where a defendant fails to appear to a writ of summons, issued out of a district registry, and the defendant had the option of entering an appearance either in the district registry or in the London office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought in due course of post to have reached him."

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because appearance has been entered; but how could the plaintiff avail himself of the irregularity except by signing judgment? And I think that the appearance is ineffectual, if the notice of appearance is ineffectual. The judgment was regular and must stand.

BRETT, L.J. The objection to the indorsement is hypercritical. The town where the solicitor for the plaintiff carried on his business is Hereford, and that is his address for service within Order IV., Rule 3a. But as the defendant does not reside within the district, an address for service in London is added. The defendant has only performed part of what is required of him: he has entered an appearance; but he has not sent notice thereof to the plaintiff's solicitor "at the address for service within the district of the district registry," as is pointed out by Order XII., Rule 6a; the plaintiff therefore was entitled to sign judgment after the expiration of the time mentioned in Order XIII., Rule 5a. The defendant was wrong, and the plaintiff was right. The judgment cannot be set aside without an affidavit of merits and payment of costs.

COTTON, L.J. I cannot doubt that the solicitor for the plaintiff has rightly described in the indorsement the address for service within the limits of the district registry. As the defendant omitted to give notice at the proper address, the plaintiff was entitled to sign judgment; and the proceeding being regular, they cannot be set aside without an affidavit of merits.

Appeal dismissed.

Solicitors for plaintiff: *Thomas White & Sons, agents for T. W. Garrald, Hereford.*

Solicitors for defendant: *Courtenay & Croome, agents for William Hebb, Ross.*

[IN THE COURT OF APPEAL.]

1878
Feb. 23.

SWAINSON *v.* THE NORTH-EASTERN RAILWAY COMPANY.

Master and Servant—Liability of Master to Servant for Injury caused by Negligence of Fellow Servant—Common Employment.

At L. were two stations, one belonging to the G. railway company, and the other to the defendants. These abutted one upon another, and were approached by parallel lines of rails; the entrance and exit from the stations were governed by signals and points worked by signalmen, whose duty was common to both stations. S. was one of these signalmen: he was engaged and paid by the G. railway company, and wore their uniform; but his duty was to attend to the defendants' trains as well as to those of the G. railway company. An engine of the defendants' was upon the lines of the G. railway company, and S. signalled to the driver to go on to the defendants' lines; the driver obeyed, and having reversed the engine, negligently ran over and killed S., who was then looking at a train coming in another direction:—

Held, reversing the judgment of the Exchequer Division, that S. and the driver of the engine were not engaged in a common employment, and that the defendants were liable to compensate the widow of S. for his death.

THE plaintiff sued to recover damages for the death of her husband, who was killed by the negligence of the driver of one of the defendants' engines.

The facts of the case and course of the trial are fully detailed in the judgment delivered by Pollock, B., and hereinafter set forth.

May 12, 1877. *Waddy, Q.C.*, for the plaintiff.
C. Russell, Q.C., and *C. Crompton*, for the defendants.

Cur. adv. vult.

June 1. The judgment of the Court (Pollock and Huddleston, BB.) was delivered by

POLLOCK, B. This action was brought by the plaintiff, who was the widow of Thomas Swainson, against the North-Eastern Railway Company to recover damages for the death of her husband, who was killed by the negligence of an engine driver in the service of the defendants. The trial took place before my Brother Quain at the Middlesex Trinity Sittings, 1876, when the following facts were proved.

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Adjoining Wellington Street, Leeds, are two railway stations, the one belonging to the Great Northern Railway Company, and the other to the North Eastern Railway Company. These abut upon each other and are approached from the south by lines of rails, two of which belong to each of these companies, the entrance to or exit from the station being governed by signals and points, which are worked by signalmen, whose duty is common to both stations.

The deceased man Swainson was one of these signalmen, and he had acted for four years in the same position. He was engaged and paid by the Great Northern Railway Company, and wore their uniform, and was not made aware at the time of his appointment that he was a joint servant, but in fact his duty was to attend to the North-Eastern trains as well as the Great Northern as to points and signals, when any engines or trucks had to be transferred from the rails of one company to those of the other; as between the two companies Swainson was one of what was called the "joint station staff," all of whom were engaged and paid by the Great Northern Railway Company, the cost of their salaries was treated as a joint charge and borne equally by the two companies, and when Swainson received his wages at the end of each week, he signed a pay sheet, which was headed, "Great Northern Railway Traffic Department Pay Bill," "Joint Station Staff."

On the 7th of May, 1875, Swainson in the discharge of his duty was standing on the six-foot space between the Great Northern arrival and the North-Eastern departure lines. A North-Eastern engine came towards the station on the Great Northern arrival rails with some Great Northern coal trucks, and Swainson signalled to the driver to go on to the North Eastern departure line. The driver obeyed and went on to that line until he passed some points, when he reversed his engine and backed out again, having a van before the engine, which obscured his view of the line. Swainson was then looking in the other direction watching a train coming from the south, and failing to observe the engine and van coming out he was struck by the step of the van, knocked down and killed.

Evidence was given on the part of the plaintiff that the engine-driver had not turned on his whistle when he backed out, and also that it was unsafe to back out with the van before the engine.

At the close of the case my Brother Quain left two questions to the jury; 1st, was there negligence on the part of the driver of the defendants' engine; and 2nd, was there contributory negligence on the part of the deceased man, Swainson?

The jury answered the first of these questions in the affirmative and the second in the negative. We see no grounds for disturbing this verdict as being against the weight of evidence upon either question. The counsel for the defendants raised, however, a further point, viz., that the driver of the engine and Swainson were engaged in a common employment, and that the risk which resulted in his death was incidental to that employment, the consequences of which he had undertaken. The learned Judge ruled against the defendants upon this point, but reserved leave to move, the Court having power to draw inferences of fact.

The case was fully and ably argued before us, and upon the facts and finding of the jury it is clear that an action would well lie against the driver of the engine, by whose negligent act the death of Swainson was occasioned. Whether the relation of Swainson to the defendants was such that this action can be maintained against the defendants, is a question the solution of which is more difficult, and requires a careful consideration both of the facts proved and of the law properly applicable to them.

It will be well in the first place to see what is the principle affecting this case, which can be gathered from authority. Up to a certain point this is clear: wherever the person injured and he, by whose negligent act the injury is occasioned, are engaged in a common employment in the service of the same master, no action will lie against the master if he be innocent of any personal negligence. The negligence of a fellow servant is taken to be one of the risks, which a servant as between himself and his master undertakes, when he enters into the service. This is thoroughly established by the cases of *Priestley* v. *Fowler* (1), *Hutchinson* v. *The York, Newcastle, & Berwick Ry. Co.* (2), and other cases.

In *Wiggett* v. *Fox* (3) the rule was held to apply where Wiggett, the person injured, was the servant of Moss, a piece worker, and he by whose negligence the injury was occasioned was in the

(1) 3 M. & W. 1. (2) 5 Ex. 343.

(3) 11 Ex. 832.

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immediate employ of the defendants; but in that case it is to be observed that although Wiggett was engaged by the pieceworker, it was a part of the agreement between the latter and the defendants that the workmen should be paid their weekly wages by the defendants, so that, as was said by Martin, B., in the course of the argument, Moss was not a sub-contractor in the sense that an action would lie against him by a stranger. In *Wilson* v. *Merry* (1) it was held that the master was protected, although the fellow-servant, whose negligence caused the injury, was a manager. So in *Morgan* v. *The Vale of Neath Ry. Co.* (2) and *Lovell* v. *Howell* (3), where the work in which the two servants were engaged was wholly dissimilar.

In all these cases there was not only a common employment, that is, an employment with a common object, but also common service, that is, service under one master. Dicta are to be found, however, in some of the cases, which tend to suggest that the principle ought to be applied to cases, in which the element of common service may be wanting. There is great difficulty in so holding, because when it is said that the servant undertakes the risk of the negligent acts of his fellow servant, the question arises, "undertakes to whom?" and the proposition must, we think, be limited by confining the undertaking to the master of the servant who is supposed to give it, and that it cannot reasonably be extended to strangers, or those who though having some interest in a joint operation are not in some sort the master of the person injured. It is not necessary, in the view which we take of this case, to pursue this further. Before dismissing the cases, however, it is right to notice two, *Voss* v. *Lancashire and Yorkshire Ry. Co.* (4) and *Warburton* v. *Great Western Ry. Co.* (5), which were cited by Mr. Waddy in favour of the plaintiff as governing the present case. In the former of these a man named Voss, a blacksmith in the employ of the East Lancashire Railway Company, was working at one of their engines, which was on their siding at the Liverpool station, when an engine belonging to the defendants and driven by one of their drivers pushed some waggons into the siding, and

(1) Law Rep. 1 Sc. Ap. 326.
(2) Law Rep. 1 Q. B. 149.
(3) 1 C. P. D. 161.
(4) 2 H. & N. 728.
(5) Law Rep. 2 Ex. 30.

so Voss was killed. The station was in the joint occupation of the defendants and the East Lancashire, but the deceased was the servant of the latter company and not of the defendants, and upon this ground the Court held that the defendants were liable. In *Warburton* v. *Great Western Ry. Co* (1) the facts as stated in the judgment of the Court were as follows:—The plaintiff was a servant in the employ of the London and North Western Railway Company, and was at work in the Victoria station in Manchester, when an engine driver in the employ of the defendants, the Great Western Railway Company, having entered the station, shunted a train belonging to the defendants from one part of the station to another, and in so doing was guilty of the negligence complained of. The station was the property of the London and North Western Railway Company, and was used in common by the plaintiff's employers and the defendants and other companies. By an arrangement between these companies, the defendants' engine-driver ought to have awaited a signal from an officer of the London and North Western Railway Company before he shunted the train into the siding; but without doing so, and without any signal at all, he shunted the train and negligently caused the injury in question to the plaintiff. Upon these facts the Court say, "We are of opinion that inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, not in the course of any common employment or operation under the same master, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore this action is maintainable."

In the present case the circumstances material to the legal position of the parties, and the rights flowing therefrom, were very different. The deceased man, Swainson, though engaged by the Great Northern Company, and wearing their uniform, was one of a joint staff, and for four years had received his weekly wages as such; he was therefore practically in the service of two companies, who quoad his service and employment were partners. But further than this, as was said by Lord Colonsay in *Wilson* v. *Merry* (2), "we must look to the functions the party discharges, and his

(1) Law Rep. 2 Ex. 30. (2) Law Rep. 1 Sc. Ap. 345.

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position in the organisation of the force employed, and of which he forms a constituent part." Referring, then, to the duties of Swainson and the very acts on which he was engaged at the time of his death, the evidence shews that they were not performed as servant of or for the benefit of one company only, but were essentially necessary for the common business of both, namely, the interchange of the traffic between the two stations.

The case therefore falls within and is governed by the principle that where there is common employment in common service the master is not liable, and our decision must be for the defendants, for whom judgment must be entered.

Judgment for the defendants.

The plaintiff appealed.

1878. Feb. 21, 22. *Benjamin, Q.C.*, and *Willis, Q.C.* (*T. L. Wilkinson* with them), for the plaintiff. The question is, whether the negligence of the driver of the defendants' engine was one of the risks which the deceased had taken upon himself: it is submitted that although he was one of the "joint station staff," he was not in the service of the defendants, and therefore not a fellow-servant with the driver of the defendants' engine.

[BRAMWELL, L.J. In *Rourke* v. *White Moss Colliery Co.* (1) it was held that a master is not liable for the negligence of his general servant, whilst that servant is acting under the orders and control of another person.]

It is plain, from the opinion of Lord Cairns, L.C., in *Wilson* v. *Merry* (2), that the exemption from liability of a master to his servant for the negligence of a fellow-servant depends upon contract: but as the deceased was not in the service of the defendants, no implied contract by him existed that they should not be liable for the negligence of their servants.

C. Russell, Q.C., and *C. Crompton*, for the defendants. The question is, whether the doctrine "respondeat superior" applies. It is too narrow a definition to say that the exemption from liability depends upon a common employment: it is more correct to say that the liability depends upon whether the person doing the injury and the person injured are members of a common

(1) 2 C. P. D. 205. (2) Law Rep. 1 Sc. Ap. 326 at p. 332.

establishment or a common family. No distinction can be drawn between the relations of the two companies as to the use of the station and the relations of the partners. The rule as to exemption has been gradually enlarged from common employment to common service: *Morgan* v. *Vale of Neath Ry. Co.* (1); *Farwell* v. *Boston and Worcester Railroad Corporation* (2). No reason exists why the exemption should not be extended to a case like this.

[BRETT, L.J. *Warburton* v. *Great Western Railway* (3) is against the argument for the defendants.]

The exemption has been held to exist where a servant has negligently injured the servant of a sub-contractor: *Wiggett* v. *Fox* (4); where the injury has been inflicted by a general servant temporarily employed by another master: *Murray* v. *Currie* (5); *Rourke* v. *White Moss Colliery Co.* (6); and also where the negligence of a servant has injured a volunteer: *Degg* v. *Midland Railway Co.* (7) As instances where the head of a common establishment has been held not to be liable for the negligence of one member thereof resulting in injury to another, may be cited *Southcote* v. *Stanley* (8); *Wilson* v. *Merry* (9). No case is to be found exactly like the present. It is unnecessary for the defendants to consider whether the master's liability is limited on the ground of a supposed contract; but in *Degg* v. *Midland Railway Co.* (7) the facts negatived the existence of any contract: the decision is in favour of the present defendants, because it shews that a person acting as servant may be disentitled to compensation, although he has not contracted with the employers of the persons doing the injury that they shall not be liable; it also establishes that if a person voluntarily puts himself in a position of danger with respect to servants, he is not entitled to sue the master in the event of his sustaining injury. If the deceased, although employed by the Great Northern Railway Company, discharged duties which involved acts of service towards the defendants and required him to do acts for their benefit, he

(1) Law Rep. 1 Q. B. 149.
(2) 4 Metcalfe's Amer. Rep. 49.
(3) Law Rep. 2 Ex. 30.
(4) 11 Ex. 832; 25 L. J. (Ex.) 188.
(5) Law Rep. 6 C. P. 24.
(6) 2 C. P. D. 205.
(7) 1 H. & N. 773; 26 L. J. (Ex.) 171.
(8) 1 H. & N. 247; 25 L. J. (Ex.) 339.
(9) Law Rep. 1 Sc. Ap. 326.

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and the driver of the engine were collaborateurs within the meaning of the rule.

Willis, Q.C., replied.

Cur. adv. vult.

Feb. 23. BRAMWELL, L.J. I think that the reasoning of the judgment in the Exchequer Division shews that this appeal must be allowed; and I am inclined to surmise that the facts were misconceived. The principle governing the liability of a master may be stated in the following manner; he is liable for an injury done to a stranger by his servant acting within the scope of the latter's authority, because the stranger has had no hand in the choice of the servant. This seems a sound rule of law; but where a person is injured by the negligence of a fellow-servant, a different rule prevails. This latter rule is not limited to the case of servants; it extends to guests, who cannot sue the master of the house for an injury done by his servants. We must consider what obligations a servant takes upon himself; it is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury; and this, I think, was the view of the law adopted in the Exchequer Division. But I differ from them in the view taken of the facts. The defendants were not in any manner the masters of Swainson; it is true that he was one of the joint station staff; and he was bound to discharge some duties for their benefit; but they could give him orders only by permission of the Great Northern Railway Company. Again, could the defendants have sustained an action against Swainson for incompetence in the discharge of his duties whereby they suffered damage? it is plain that they could not. It may seem strange that if there had been a partnership between the defendants and the Great Northern Railway Company as to the business carried on at the joint station, neither company would

have been liable for the injury done to their servants; and it may be argued that the only difference between a partnership and the mode of conducting the business in the present case is one of form; but the answer is, that in the case of a partnership Swainson would have been entitled to a remedy against the defendants in the event of the non-payment of his wages; and though in point of fact this may not have been a great advantage, yet the principle remains the same. It may be said that in working the signals for the defendants' engine he was a volunteer working for both companies, and was in a common employment with the driver; but I do not think that that contention would be well-founded; it would resemble the case where a carman receiving cotton was injured by the negligence of the servants of the brokers employed in delivering it; and it was held that the brokers were liable (1), for the carman and the servants of the brokers were not under the same control, and were not members of a common establishment; the work was joint, but the employment was different. Moreover, in the present case, Swainson at the moment when the accident happened was no longer engaged in a common employment with the driver of the defendants' engine.

I am of opinion that the judgment must be reversed.

BRETT, L.J. I am of the same opinion. We are not entitled to consider the origin of the rule, which exempts a master from liability when his servant is injured by the negligence of a fellow-servant; but it has been said that the exemption depends upon an implied contract entered into between the master and servant. I think, however, that the plaintiff in the present case is entitled to recover, because at the time of the accident the deceased was not in a common service, nor engaged in a common employment with the driver of the engine, nor engaged in a joint operation. I think that the authorities bear out the proposition laid down in the Exchequer Division that in order to give rise to the exemption there must be a common employment and a common master; it is not necessary that there should be a common service for a definite time or at fixed wages; for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment; a volunteer puts himself under the

(1) See *Abraham* v. *Reynolds*, 5 H. & N. 143.

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control of another person, and in respect of that other person he is for the time being in the position of a servant. For the defendants it was not denied that this doctrine is well established, but it was contended that the driver of the engine and the deceased were collaborateurs. To a certain extent I should agree with the argument; but the question is, did the deceased adopt such terms of service as placed him under the orders of the defendants? if he did, I think that would be sufficient to exempt them from liability. That Swainson became their servant pursuant to contract could not be maintained: the only circumstance giving colour to such an argument was his signature to certain pay-sheets; but that is clearly insufficient to constitute him the defendants' servant. It was contended that as regards the use of the station the two railway companies were practically partners: I cannot come to the conclusion that they were: therefore no contract existed between Swainson and the North Eastern Railway Company, and he was servant to the Great Northern Company alone. Then did he adopt such terms of service as placed him under the orders of the defendants? If the question had been properly raised, it might have become necessary to consider whether in signalling the defendants' engine to move from the Great Northern rails he did adopt the terms of such a service; but at all events he ceased to be under the orders of the defendants, when he had finished with the operation of signalling; and I doubt whether he was under their orders even whilst he was engaged in that operation. What was the state of affairs when the accident happened? The train had been changed from the Great Northern line on to the North Eastern line; Swainson then had nothing further to do with the North Eastern line: he was acting solely on behalf of the Great Northern Railway Company and was not assuming to act upon behalf of the North Eastern Railway Company. Upon the other hand, the driver of the engine was solely under the control of the defendants. It seems to me that the two men were strangers to one another and not fellow-servants.

COTTON, L.J. I am of opinion that the judgment of the Exchequer Division must be reversed. The driver of the engine was the servant of the North Eastern Railway Company, and the act of a

servant is the act of his employer, therefore the defendants are primâ facie liable; but it is a rule that where one member of an establishment is injured by the negligence of another member of it, the master is not answerable. It is unnecessary to consider how the rule arises; but it is clear that if a person takes upon himself to act as a member of an establishment, he cannot maintain an action against the head of it for an injury occasioned by the negligence of any person belonging to it. A volunteer is in the same position as a servant: *Degg* v. *Midland Ry. Co.* (1) It must be shewn that in some sense the deceased was the servant of the defendants; but he and the driver of the engine were not acting together at the moment of the accident, they were doing nothing whatever in common: for the reasons assigned by Brett, L.J., which I need not go through, I think that the shunting was over, and that the driver of the engine had again become solely the servant of the defendants; he had passed the bit of line which led from the Great Northern Company's rails to those of the defendants, and had nothing more to do with the former company. Then the circumstance of Swainson's signing the pay-sheet did not constitute him the servant of the defendants. It is true that he was a member of the "joint station staff," but the Great Northern Railway Company had no power to pledge the defendants' credit to Swainson, who was under the orders of that company alone; during the shunting operations he might attend to any suggestions which might be made to him on behalf of the defendants, but that did not make him a servant of the defendants. It may be said that the defendants paid him a portion of his wages, and that this created the relation of master and servant between them; but in truth the Great Northern Company paid the whole of his wages, and one-half of them was repaid by the defendants: and upon the facts, I come to the conclusion that all those employed by the Great Northern Railway Company were paid by them alone.

Judgment reversed.

Solicitor for plaintiff: *W. Elgood.*

Solicitors for defendants: *Williamson, Hill, & Co., for Richardson, Gutch, & Co., York.*

(1) 1 H. & N. 773; 26 L. J. (Ex.) 171.

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Jan. 24.

[IN THE COURT OF APPEAL.]

LEYMAN *v.* LATIMER AND OTHERS.

Defamation—Conviction for Felony—Effect of Enduring the Punishment—9 Geo. 4, c. 32, s. 3.

In an action by the editor of a newspaper for libel by printing and publishing of him in another newspaper that he was "a convicted felon" and also a "felon editor," the defendants justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labour. The plaintiff replied that the conviction had taken place many years previously, that he had endured the punishment and had thereby become in the same situation as if a pardon under the great seal had been granted to him. At the trial the judge held that the alleged libels merely meant that the plaintiff had been convicted of felony, and that this being true the plaintiff could not recover:—

Held, affirming the judgment of the Exchequer Division, that upon demurrers to the justification and to the reply the plaintiff was entitled to judgment, and also that there must be a new trial.

Per Bramwell, L.J., that the words "felon editor" implied that the plaintiff had been guilty of felony, and the justification did not allege that he had actually committed felony; and therefore although the plaintiff might be "a convicted felon," yet the justification being pleaded to the whole cause of action was too wide and formed no defence.

Per Brett and Cotton, L.JJ., that the question as to the meaning of the alleged libels ought to have been submitted to a jury; that by 9 Geo. 4, c. 32, s. 3, a person convicted of felony after enduring the punishment is in law no longer a felon, and that the justification was bad for not alleging that the plaintiff was then enduring the punishment.

APPEALS by the defendants from the decision of Cleasby and Pollock, BB., upon a rule for a new trial and upon cross-demurrers. The facts and pleadings are stated in the report of the proceedings before the Exchequer Division (1), and it is unnecessary to repeat them here.

Cole, Q.C., and *Bullen*, for the defendants, in support of the appeal. The judgment of the Exchequer Division is based chiefly upon the effect of 9 Geo. 4, c. 32, s. 5; but the construction put upon that statute is wrong. It does not place a felon, who has endured his punishment, in the same position as if he had received a pardon on the ground of innocence. The object of the legislature was merely to enable a person convicted of felony to give

(1) Ante, p. 15.

evidence, as is plain from the title of the statute, namely, "An Act for amending the Law of Evidence in certain Cases." It was not intended that by enduring the punishment the effect of the conviction and sentence upon the credit of the felon should be taken away. The words "is a convicted felon" mentioned in the fourth paragraph of the statement of claim simply mean that the plaintiff had been at some time convicted of felony, and it is immaterial that the word "is" is used instead of "was."

[BRETT, L.J. According to that argument for the defendants, if the plaintiff had been pardoned upon the ground of innocence, he would still be liable to be called a "convicted felon." It is to be observed that the preamble of s. 3 of 9 Geo. 4, c. 32, mentions civil rights: this shews that the enactment had other objects besides making a felon a competent witness.]

Cuddington v. *Wilkins* (1) is not in point for the plaintiff as to the effect of the old law, for it was a case of a general pardon; and despite of some expressions of opinion in that case it seems plain from *Sir Henry Fines' Case* (2), that a special pardon does not restore a convicted felon to the position of an innocent man: and a felon, who has endured his punishment, is, under 9 Geo. 4, c. 32, s. 3, at most only in the place of a person specially pardoned. Moreover in *Cuddington* v. *Wilkins* (1) it does not appear that the plaintiff had been convicted. No doubt, as is clear from the dictionaries of Johnson and Webster, the word "felon" strictly means one who has committed felony; but the alleged libels are to be construed in their popular sense, and according to ordinary interpretation "convicted felon" and "felon editor" simply mean one who has been at some time convicted of felony, and this is admitted even by the plaintiff to be true.

Collins, Q.C. (*G. Pitt Lewis* with him), for the plaintiff. It is unnecessary to rely upon the libel of the 24th of April. The plaintiff may take his stand upon that of the 1st of May, and at the trial prove the former as evidence of malice. In their ordinary sense the words would mean that the plaintiff at the time of publication was undergoing punishment for felony, and this is clearly untrue. [He was then stopped.]

(1) Hob. pp. 67, 81. (2) Godbolt, 288.

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BRAMWELL, L.J. In my opinion these appeals must fail. I do not like to base my decision upon a merely technical view of the case before us; but it seems to me that the defendants are technically wrong. I agree with Blackburn, J., who at the trial acted both as judge and jury, that the words "convicted felon" published in the defendants' newspaper of the 20th of April meant that the plaintiff had been previously convicted of felony. I do not think that they meant that he was then undergoing punishment for felony. The words are literally true, for the plaintiff has at some previous time been convicted of felony. I agree with Blackburn, J., that so far the defence has been made out; but at the trial the words "bankrupt and felon editors" published on the 1st of May appear to have been overlooked. The defendants admit that "felon editor" was intended to apply to the plaintiff, and these words must be taken to mean that the plaintiff has been guilty of felony. So far as the facts are before us, all the averments contained in the third paragraph of the reply are true, and the plaintiff is entitled to have all the issues of fact found in his favour, for the allegation as to the effect of enduring the punishment is a mere conclusion of law. The plaintiff has demurred also to the fourth paragraph of the statement of defence, which simply alleges that he has been convicted of felony. He probably intended to urge that it is no answer to the fourth paragraph of the statement of claim, alleging that the defendants published in the present case that he "is a convicted felon;" but however that may be, I think the demurrer valid, because no defence is shewn to the libel of the 1st of May. That charges the plaintiff with being a "felon editor," and in order to sustain it the defendants must shew that the plaintiff has actually committed felony. It is plain from the numerous authorities cited in 2 Taylor on Evidence, pt. 3, ch. iv. par. 1693, p. 1416 (7th ed.), that a conviction for felony is res inter alios acta, and of itself is no evidence in any civil proceeding, that the person convicted has committed a felony. (1) The dictionaries cited during the argument shew that "felon" means one who has committed felony, and therefore the defendants do not prove the truth of the libel of the 1st of May merely by shewing that the plaintiff has been convicted of felony. This is not only the legal

(1) See 2 Phillipps on Evidence, part 2, ch. 1, sec. 1, p. 27, (10th ed.)

view of the question, but it is also the conclusion to be drawn upon considering it as a matter of good sense. A man may be wrongfully convicted, and may afterwards be pardoned upon the ground of his innocence: in a case of this kind it would be untrue to call him a felon. I think that the demurrer to the fourth paragraph of the statement of defence is good. That paragraph is pleaded to the whole cause of action. It is too wide, for it contains no answer to the libel of the 1st of May, and therefore being bad in part it is bad altogether. The plaintiff also replied the conviction, to which the defendant has demurred. I think that this demurrer is bad. The rule is that where there is a demurrer to a reply pleaded to a bad defence, the plaintiff is entitled to judgment upon the whole record, because upon going back to the root of the mischief it is found that the cause of action is unanswered. For these reasons I think that the plaintiff must succeed altogether upon the demurrers, although except for the purpose of estimating the costs it is immaterial whether he ought to succeed upon the pleadings as to the libel of the 24th of April. Therefore we must grant a new trial.

In my point of view the question does not arise as to the effect of 9 Geo. 4, c. 32, s. 3: it may be stated as follows: is a man, who has been convicted of felony, entitled to say that he is no longer a felon merely because he has undergone the punishment for it? I do not wish to express any opinion upon the subject, except to say, that as at present advised, I do not concur in the learned judgment delivered in the Exchequer Division. It is no doubt desirable that a time should come when a person who has been convicted of felony should cease to be called a felon, and it is cruel to rake up what is past; but on the other hand it is part of the punishment for a crime, that the person committing it should suffer opprobrium; and it would be strange to say that a person formerly convicted upon the clearest evidence of felony is no longer a felon. But as the case comes before us, I think that the plaintiff is substantially entitled to succeed upon all the points brought under our consideration.

BRETT, L.J. In my opinion the question as to the construction of 9 Geo. 4, c. 32, s. 3, does present itself for our consideration.

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As it seems to me, the case in point of fact has not been tried; the learned judge at the trial assumed that all the facts had been ascertained, and that the statements complained of were defamatory; but he held that the plaintiff could not recover because the defamatory matters were true; this was an erroneous course, for a question of libel is a question of fact, and evidence ought to have been given of the circumstances under which the statements complained of were published. As to the construction of the statement of the 24th of April, I myself am inclined to agree with Lord Justice Bramwell; but a jury might come to a different conclusion. Even as to the statement of the 1st of May, a jury might possibly find that the plaintiff is a felon within its meaning; for it is admitted that he has been at some time convicted of felony, and the defendants may have only intended to convey that, and I suppose and shall assume that the plaintiff was rightfully convicted: nevertheless, this does not decide the appeal, for I am prepared to hold that inasmuch as he has endured his punishment, he is not now in law a "felon:" endurance of the punishment does away with the felony: I say so on the authority of *Cuddington* v. *Wilkins* (1), which was a correct, and, in my opinion, a righteous decision. The judges thought that they ought not to favour idle and injurious words; and I may add that to allow defamatory words to pass unchecked is against public policy. *Cuddington* v. *Wilkins* (1) is supported by *Searle* v. *Williams* (2), and by the great authority of Hawkins' Pleas of the Crown, book 2, ch. 37, s. 48 (title Pardon). It is no doubt right, upon public grounds, to uphold this doctrine, and to my mind by enacting 9 Geo. 4, c. 32, s. 3, the legislature deliberately adopted the view of the judges: it was considered to be proper that a person, who had endured the punishment for a felony, should not be liable to have reflections made upon him. I think that Blackburn, J., was wrong in the course which he took, at all events as to the libel of the 2nd of May, and that upon the facts as they appear before us he ought to have found the issues of fact in favour of the plaintiff on the ground that the defendants intended to describe him as still being a "felon."

I am clearly of opinion that neither demurrer ought to have

(1) Hob. 67, 81.

(2) Hob. 288, at p. 293.

been pleaded, because unless every part of a pleading demurred to is bad, a demurrer under the present system leads to a useless expenditure of costs. But as these demurrers are before us, we must give judgment upon them. Upon the face of the pleadings, to which the demurrers relate, the statements complained of must be read in the ordinary sense of the language employed, and not with a meaning which a jury might possibly find to have been intended to be conveyed; and even if the words "convicted felon," and "felon editor," could be construed as alluding to a past time only, they must be taken to imply actual guilt, and the fourth paragraph of the statement of defence would be bad, because it merely alleges that the plaintiff has been convicted, and not that he has been guilty of felony; but in my view the defence fails because the justification does not allege that the plaintiff was, at the time of publishing the libels, undergoing punishment; and the matter is put in a clear light by the reply, which avers that the conviction took place many years ago. Upon the whole record the plaintiff is entitled, and the judgment of the Exchequer Division was right.

I only wish to add that nothing in our judgment has a tendency to limit the power of inquiry into the previous character of a person tendering himself as a witness: questions may then be put from a justifiable motive, and the occasion is proper; but needlessly to rake up the past misfortunes of another person shews a malignant and wicked frame of mind.

COTTON, L.J. I think that the plaintiff is entitled to an order for a new trial. The case was called on before Blackburn, J., who informed the counsel for the plaintiff that if the case were tried he should direct a verdict for the defendants; and the matter for our consideration is whether that direction could have been right. The question of libel or no libel is for the jury. It is possible that the words of the first libel can be construed as importing that the plaintiff was then a felon; but I incline to think that they only mean that at some previous time he has been convicted of felony; but the words of the second libel may, it is clear, mean that he was undergoing punishment for felony; and in any point

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of view the opinion of a jury ought to have been taken. I think, therefore, that the course adopted by Blackburn, J., was wrong.

I agree with Brett, L.J., as to the effect of a pardon for felony after conviction. I think it impossible to say that s. 3 of 9 Geo. 4, c. 32, was intended simply to render a convicted felon competent to give evidence; no doubt the principle object of the statute, in which it occurs, was to allow persons to be called as witnesses, who had been previously disqualified: nevertheless, I think the third section was passed also with a view to ascertain civil rights; and my view seems to be supported by the proviso referring to punishment for a subsequent felony. By the very words of the statute the endurance of the punishment has the same effect as a pardon after conviction; under the previously existing law after conviction and pardon it would not be actionable to say that the person pardoned had been convicted, but it would be actionable to say that he was still a felon: it was, no doubt, thought a matter of public policy a person leading a reputable life should not be reproached with his former misfortune; this doctrine is distinctly laid down in *Cuddington* v. *Wilkins* (1), and no case has been cited before us to the contrary. It follows that in law the plaintiff cannot be stigmatised as a felon. I need hardly say that the statute does not prevent a full inquiry into the past history of any man, whenever it is a matter of duty to form a right estimate of his credibility or character.

I do not wish to add anything to what has been said by Brett, L.J., as to the demurrers. I entirely agree with his view as to the construction of the pleadings, and with the result at which he has arrived. A demurrer is useful only when the whole question between the parties is raised upon it, and, when the dispute can be decided without going into evidence.

Appeals dismissed.

Solicitors for plaintiff: *Coode, Kingdon, & Cotton, for John Daw & Son, Exeter.*

Solicitors for defendants: *Surr, Gribble, & Bunton, for J. W. Wilson, Plymouth.*

(1) Hob. 67 & 81.

[IN THE COURT OF APPEAL.]

1878
June 25.

ETTY *v.* WILSON.

Practice—Court of Appeal, Jurisdiction of—Nonsuit—Rules of the Supreme Court, Order XL. r. 4.

Upon a nonsuit at a trial before a judge and jury an application for a new trial ought to be made to the Divisional Court, and not to the Court of Appeal.

ACTION on an attorney's bill.

At the trial before Denman, J., and a jury the plaintiff called witnesses to support his claim, who were cross-examined by the defendant's counsel. At the close of the plaintiff's case the learned judge ruled that the evidence failed to establish any case, and directed that a nonsuit should be entered. No question was left to the jury. The defendant was prepared with evidence to contest the plaintiff's case.

The plaintiff appealed from the judgment of nonsuit at the trial before the learned judge.

C. Russell, Q.C., and *W. R. Kennedy*, for the defendant, interposed with a preliminary objection. The appeal does not lie to this Court; the application is for a new trial, and therefore ought to have been made to the Divisional Court under Order XXXIX., Rule 1 *a*. Order XL., Rule 4 (1), so far as it applies to the case of a trial before a judge and jury, confers no power on this Court to grant a new trial, it only applies to cases where there has been a finding by the jury and the judgment has been wrongly entered on the finding.

(1) By Order XL., Rule 4, "Where, at and after the trial of an action by the jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

"Where, at or after the trial of an action before a judge, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the findings as entered the judgment so directed is wrong."

"An application under this rule shall be to the Court of Appeal."

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French, for the plaintiff. Assuming that the defendant is content to take the judgment in his favour, the plaintiff's remedy is in this Court. All the evidence is admitted and on the judge's notes, and it is on such facts that the judge decides the case. It is as if the jury had been discharged, and the application then would be rightly made to this Court under the second clause of Order XL., Rule 4.

C. Russell, Q.C., was not heard in reply.

BRAMWELL, L.J. I think that this objection ought to prevail. I can see no difference between this case and one which was decided a few days ago in this Court (1). It cannot be that if the judge directs the jury to find for the defendant, the appeal should be to the Divisional Court, whereas if he directs a nonsuit the plaintiff must come to the Court of Appeal.

BAGGALLAY, L.J., concurred.

THESIGER, L.J. I am of the same opinion; and I will only add that I express no opinion as to the case where the nonsuit is directed on admitted facts entered in the judge's notes. But here that is not the case. The plaintiff was cross-examined, and the defendant was prepared to give evidence. We must follow the rule laid down the other day. (1) Upon a nonsuit, if the facts are admitted, and the judge decides on the admitted facts, there may be two ways in which the appeal may possibly be said to lie to this Court. The proceeding may be regarded either as a discharge of the jury and a finding of the facts by the judge, or a judgment upon facts which, being admitted, are regarded as the findings of a jury.

Appeal dismissed.

Attorney for plaintiff: *H. G. Field, for Etty, Liverpool.*

Attorneys for defendant: *J. & R. Gole, for Evans & Lockett, Liverpool.*

(1) *Yetts* v. *Foster*, 3 C. P. D. 437.

LORD RIVERS *v.* ADAMS.
SAME *v.* ISAACS.
SAME *v.* FERRETT.

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Aug. 8.

Common—Profit à prendre—Right to cut Underwood—Custom—Prescription—Lost Grant to Inhabitants of Parish.

A right claimed by the inhabitants of a parish to cut and carry away for use as fuel in their own houses fagots or baskets of the underwood growing upon a common belonging to the lord of the manor is a right to a profit à prendre in the soil of another. Such a right, therefore, cannot exist by custom, prescription, or grant, unless it be a Crown grant which incorporates the inhabitants.

Such a Crown grant will not be presumed from proof of user by inhabitants if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed at any time.

Such a presumption would, moreover, be wholly unreasonable in a case where at the time when the corporation was supposed to be in existence and entitled to the right, the tenants of the manor were exercising inconsistent rights and asserting their entire control over the underwood.

The user must be connected with the right claimed. A prescriptive right to cut underwood in respect of a particular house is not established by proof of user when the only evidence is that the right was exercised in respect of the inhabitants of the parish generally.

Chilton v. *Corporation of London* (7 Ch. D. 735) followed; *Willingale* v. *Maitland* (Law Rep. 3 Eq. 103) discussed.

SPECIAL CASE stated under a judge's order made by consent in August, 1873, in three actions of trespass:—

1. The actions were against three inhabitants of cottages in Tollard Farnham, a parish within the ancient boundary of Cranbourne Chase, in Dorsetshire. Each of the defendants did on several days in March, 1873, and before Lady Day, cut upon and carry away from the woodland (formerly part of Tollard Farnham Common) belonging to the plaintiff as lord of the manor of Tollard Farnham, certain quantities of haskets and furze. All such haskets and furze were used by the defendants respectively for fuel in their own houses, and no part thereof was sold or carried out of the parish of Tollard Farnham. These were the trespasses sued for. The defendants claimed to commit them as of right.

2. The right claimed, as stated by the witnesses called for the defendants, was for all the inhabitants of the parish of Tollard Farnham to cut haskets on the Tollard Farnham Common from

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old Michaelmas Day in each year till old Lady Day in the next year, and to cut furze there all the year round, and to carry away such haskets and furze for use as fuel in their own houses or elsewhere in the parish, but not for sale or use out of the parish.

[The case, which, with the schedules, occupied more than 150 printed folio pages, need not be reproduced here, all that is material to this report being stated in the judgment.]

The questions for the opinion of the Court (who were to be at liberty to draw inferences of fact and to make all necessary amendments in the pleadings) were:—

1. Whether the inhabitants of Tollard Farnham, or any of them, were entitled to any, and what right of cutting furze or underwood on the locus in quo either as part of Tollard Farnham Common or on any other and what grounds; and, if so, then,

2. Whether such right was vested in all the inhabitants of the parish of Tollard Farnham, and, if not, then,

3. Whether such right was vested in all the inhabitant householders in the parish, and, if not, then,

4. Whether such right was confined to the occupiers of ancient messuages within the parish.

5. Whether any, and which, of the defendants were entitled, as such inhabitants, householders or occupiers, to commit the alleged trespasses.

6. Whether any, and which, of the defendants were, on any and other, and what ground, entitled to commit the alleged trespasses.

Judgment to be entered in each case separately, as the Court should direct, with such injunctions and for such sum to be assessed in such manner as the Court should direct.

May 15, 16, 17, 20, 21. *C. Bowen* (*R. S. Wright*, with him), for the plaintiff.

E. Clarke (*McClymont*, with him), for the defendants.

The arguments are sufficiently noticed in the judgment. The following authorities were cited in addition to those referred to in the judgment: *Croughton* v. *Blake* (1); Manwood on Forest Law, p. 80; Watkins on Copyholds, pp. 451, 452; Grant on Corpora-

(1) 12 M. & W. at p. 208.

tions, p. 107: *Blewett* v. *Tregonning* (1); *Warrick* v. *Queen's College* (2); *Grimstead* v. *Marlowe* (3); *Crowder* v. *Oldfield* (4); *Carr* v. *Foster* (5); *Papendick* v. *Bridgwater* (6); *Doidge* v. *Carpenter* (7); *Hall* v. *Nottingham* (8).

Cur. adv. vult.

August 8. The judgment of the Court (Kelly, C.B., Cleasby and Pollock, BB.), was delivered by

KELLY, C.B. The question argued before us in this case has been whether the inhabitants of the parish of Tollard Farnham, in the county of Dorset, have the right to cut and take fagots or haskets of the underwood growing upon a part of the common which has been inclosed by the plaintiff. Some argument was raised before us upon the right of the defendants, in case they failed to establish any right in the inhabitants, to fall back upon a prescriptive right to take the haskets in respect of the cottages occupied by them respectively. This part of the case will be dealt with hereafter.

At present we deal with the question, which was fully argued before us, viz., the right of the inhabitants as inhabitants. The user and the extent of user are stated in the case. It is stated to have been as of right, but (see paragraph 50), the nature of the right in respect of which it was exercised is one of the questions to be decided by us. There cannot, we think, be a doubt upon the evidence that the user was in fact upon the right of inhabitants as stated in paragraph 2 of the case. The defendant in the first action, Adams, says in his evidence (page 150) that the common was free to everybody in the parish. So that as far as the user goes it agrees with the claim set up, and notwithstanding some expressions to be found in the evidence there is no ground for regarding this as a case in which a particular provision has been made by royal grant or otherwise for the poor of the parish.

If such a right could be claimed by custom there is evidence of

(1) 3 A. & E. 554.
(2) Law Rep. 10 Eq. 105; 6 Ch. 716.
(3) 4 T. R. 717.
(4) 1 Salk. 170.
(5) 3 Q. B. 581.
(6) 5 E. & B. 166; 24 L. J. (Q.B.) 289.
(7) 6 M. & S. 47.
(8) 1 Ex. D. 1.

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user which, coupled with the evidence of reputation, might raise a question whether the custom did not exist. But the right claimed is a profit à prendre in the soil of another, and the authorities are uniform from *Gateward's Case* (1) to *Chilton* v. *Corporation of London* (2) that such a custom is bad in law: see *Selby* v. *Robinson* (3); and *Constable* v. *Nicholson* (4); where other authorities are given. Many sound reasons are given in the authorities for this conclusion. It is only necessary to advert to some of those given in *Gateward's Case* (1), because they may be applicable to another view of the present case. It was not a case in which the inhabitants of a certain village generally claimed a profit à prendre, but the plea alleged that by custom all persons inhabiting any ancient messuages should, by virtue of their inhabitancy, have a certain right of common. It was adjudged by all the justices that such custom was against law for several reasons; among others, "2. What estate shall he have who is inhabitant in the common when it appears he hath no estate or interest in the house, but a mere habitation and dwelling?" . . . And "3, Such common will be transitory and altogether uncertain, for it will follow the person, and for no certain time or estate, but during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance. 4. It will be against the nature and quality of a common, for every common may be suspended or extinguished, but such a common will be so incident to the person that no person certain can extinguish it, but as soon as he who releases, &c., removes, the new inhabitant shall have it."

It might also be added in relation to such a right as is claimed in the present case, viz., to be provided with fuel from the common that mere inhabitancy is capable of an increase almost indefinite, and if the right existed in a body which might be increased to any number, it would necessarily lead to the destruction of the subject-matter of the custom. There cannot therefore be such a custom. And for the same reasons, and for other reasons, there cannot be a prescription, and there could not be a valid grant unto so fluctuating a body and a body so

(1) 6 Rep. 59, b.
(2) 7 Ch. D. 735.
(3) 2 T. R. 758.
(4) 14 C. B. (N.S.) 230; 32 L. J. (C.P.) 240.

incapable of succession in any reasonable sense of the word so as to confer a right upon each succeeding inhabitant.

The judgment in *Constable* v. *Nicholson* (1) is correctly given in the head-note (except in the use by mistake of the word "easement" for "right.") It is as follows:—"The right of the inhabitants of a township to take stones from the land of another person for the purpose of repairing the highway is a profit à prendre, and cannot therefore be claimed by custom; neither can it be claimed by prescription, as inhabitants are incapable by that description of taking such an easement (right) unless under a grant which would incorporate them." The following are the words of Willes, J., in his judgment (2) as regards the prescription or supposed grant after disposing of the question of custom. "The prescriptive right is not claimed for a corporation or persons taking by succession, but only for a fluctuating body of inhabitants. The prescription pleaded is a grant to that body, but not so as to have the effect of incorporating them. It is clear that such a right cannot exist." See also the decision of Jessel, M.R., to the same effect in the current number of the Law Reports—*Chilton* v. *Corporation of London.* (3)

The claim then can only be supported as resting upon a supposed grant by the Crown to the inhabitants of the right in question as such a grant alone would have the effect of incorporating them, and the argument addressed to us was upon the propriety, and indeed necessity, of presuming such a grant from the user set out in the case. But in dealing with this question, we shall have to bear in mind that there is a difference between a corporate body and the persons who for the time being compose it, and that the members for the time, in their own individual right, take nothing by the grant to the corporation.

There was a considerable argument before us upon the effect of a grant by the Crown to the inhabitants of a parish or village. The question seems to have arisen frequently in early times, and there are several decisions in the Year Books on the subject which are to be found in all the Abridgments under the title Corporation. They are given in Rolle's Abridgment and copied

(1) 32 L. J. (C.P.) 240. (2) 32 L. J. (C.P.) at p. 244.
(3) 7 Ch. D. 735.

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into the other Abridgments. The effect of them appears to be that where there is a grant by the Crown to the inhabitants of a particular parish or village, if the grant is made for a specified purpose, it has the effect of incorporating them so as to carry that purpose into effect, but otherwise is inoperative. Thus it is said, F. pl. 2, In ancient time the inhabitants of a village were incorporated when the king granted them to have a guild of merchants (guilda mercatoria). Pl. 4. If the king grant land to the men or inhabitants of D. their heirs and successors rendering rent for anything touching this land, it is a corporation, but not for any other purpose. (And it is said in Dyer, 100, pl. 70, though not as a decision, but as an opinion that if the rent be released the corporation is ipso facto dissolved, because the rent was the cause of the incorporation.) Pl. 5. But if the king grant lands to the men or inhabitants of D. unless they be incorporated before, the grant is void if nothing be reserved for rent. Pl. 6. If the king grant to the men of Islington to be discharged of toll it is a good corporation to this intent, but not to purchase. And the reason is given. (This is matter of discharge.) Pl. 7. If the king grant land to the inhabitants of Islington and their successors, if they were not a corporation before, this is a void grant, for the king is deceived. In other words, the inhabitants of a place cannot be said to have successors capable of taking unless they be a corporation.

The case, therefore, stands thus. We are called upon to say, because there has been user in the inhabitants individually of this right, not that there has been merely a grant to the same persons who exercise the right (which would be the proper inference in ordinary cases, without regard to the probability of its actually taking place, but which would in this case be inoperative), but that there has been a grant in such a form as to make them into a body corporate having perpetual succession. It appears to us that we ought not to make this presumption, not because it is improbable, but because it is inconsistent with the past and existing state of things. We are to presume that a corporation has been formed many hundred years ago, when there is no trace at any time of its having ever existed. If the inhabitants had held meetings in reference to this right, or appointed any officer to

look to the right, or done any act collectively of that description, the case would be different. We should then have the inhabitants acting in a corporate capacity in reference to this right, and from their doing so, and from their existence de facto as a corporation, we might according to the ordinary rule find a legal origin by a grant from the Crown; but to say that a corporation was created, which has never existed, would be carrying the fiction of a grant further than has ever been done, or than is consistent with reason. And the presumption is made wholly unreasonable when we have, as in the present case, while the supposed corporation is existing and entitled to take the haskets, another body actually existing and legally existing, viz., the tenants of the manor, who are exercising inconsistent rights and publicly asserting their entire control over the underwood on the common.

There is also another reason against making this presumption, which was strongly and properly pressed by the learned counsel for the plaintiff, and which is not applicable to any of the cases in which similar presumptions have been made, viz., that we are asked to presume the action of the Crown in favour of a right in the inhabitants, which could not exist as a custom, because it is unreasonable and contrary to law, and that the Crown, because this could not be done otherwise, got over the difficulty several hundred years ago by making them into a corporation. We cannot make this presumption, not because it is improbable, but because it is most unreasonable.

We were much pressed on behalf of the defendants with the case of *Willingale* v. *Maitland* (1), but when that case is examined it has no bearing upon the exact question which is raised in the present case. It was a demurrer to a bill for want of equity. The bill alleged that Queen Elizabeth, being lady of the manor of Loughton, which was within the royal forest of Waltham, had by her royal charter granted to the inhabitants of the parish of Loughton that the labouring or poor people inhabiting the said parish and having families might at certain times of the year cut certain underwood, and that the rightful disposition of the wood so cut should be for their own consumption and for sale for their own relief to other inhabitants of the parish for their consumption.

(1) Law Rep. 3 Eq. 103.

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The bill being demurred to, the facts were admitted as stated, and it was therefore admitted that there was a grant in the very precise terms stated, which it will be contended had the effect of incorporating the inhabitants for the purpose of carrying into effect the specified charitable object. Accordingly Lord Romilly, M.R., says (1): "It should be observed that, though it is true, as stated in Sheppard's Touchstone, that a grant cannot be made beneficially to the inhabitants of the parish as grantees, yet it is certain that a grant may be made by a private individual in the shape of a charity in trust for the poor inhabitants of a parish, and that such a trust is perfectly good." He afterwards adds, "The books are full of cases in which grants of that description have been supported and established, and this Court has carried the trusts into execution." He afterwards refers to the Act of 14 & 15 Vict. c. 43, by which Hainault Forest was disafforested, and in which a certain privilege of widows residing within a certain district was recognised as a ground for compensation, and eventually decides that, "as it stands on the bill, if the whole bill is to be taken as true, there is a case made for relief."

It is to be noticed that nothing whatever was granted to the inhabitants, neither land nor privilege of any sort; the only grant to the inhabitants was that the labouring poor should have the privilege as alleged, and under a grant from the Crown they may become a corporation and ought to act as such for the purpose of performing this charitable trust.

In the present case we are not dealing with a trust to be performed for the benefit of a limited body, but with the right of the inhabitants generally, and the case renders no assistance in considering without a grant to the inhabitants generally what ought to be presumed from user.

The subsequent case of *Chilton* v. *Corporation of London* (2), before the present Master of the Rolls, should be read in connection with the above case.

A passage in the 4th Inst., p. 297, was referred to because it was said that Tollard Farnham was within the Forest of Cranbourne. Coke is treating of the Courts of the Forest, and he says, "And concerning claims" (meaning claims in the Court of th.

(1) Law Rep. 3 Eq. at p. 109. (2) 7 Ch. D. 735.

Forest), "it is specially to be observed that by the forest law a grant made of a privilege within the forest to all the inhabitants being freeholders within the forest or such other commonalties not incorporated, is good." The answer given to this was that it has reference to claims made in the court of the forest, the claim being for what is called a privilege which involves more the idea of exemption from the forest law than the acquisition of property; and further, that although we have abundant proof that Cranbourne was a chase, there is no proof that it was ever a forest in the proper sense of the word; and still further, that we are not dealing with privileges under the law of the forest, but with property under the common law. We are therefore engaged in a different court from the court of the forest, upon a different subject, viz., property, and not privilege, and there is an absence of proof of there being a forest, so that the passage in Coke is inapplicable.

It was impossible to pass over these matters which were so fully argued before us, but there is another reason why we cannot be called upon to find a grant from the Crown in the present case. In most cases where a grant is presumed from user in favour of an individual, the proof of user is definite and complete, but in the present case we are called upon to infer a grant not to an individual but to a class, viz., the inhabitants of a parish, and therefore, in order to found it, there must be proof of user not by some inhabitants, but by the class, that is by inhabitants generally. Now, for the purpose of making this out, reference was made to many schedules annexed to the case.

Schedule 9 was the most important, giving a list of all the tenements in the parish, and shewing in a tabular form in respect of which of them user had been proved, how far their title was derived from the lord, and by which of the persons either claiming title to or occupying the tenements there presentments had been made in the manor court restricting the right to take haskets to the tenants of the manor.

We had also in another schedule (5) presentments taken from the court rolls of the manor relating to the right to cut fuel from the year 1748; also extracts from the parish books (schedule 16), one effect of which appeared to be that the poorer inhabitants had

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taken fuel from the common and been assisted by the overseers in getting it home. We had also presentments extracted from the chase rolls of Cranbourne Chase, and the other schedules enumerated in page 15 of the case.

Now, we are dealing with the right to take fuel from the waste of the manor, in which, primâ facie, the tenants of the manor exercised the right as tenants of the manor; the fact that other inhabitants of the parish exercised the right would only prove a right in those other inhabitants as inhabitants, and would not prove the right in the inhabitants generally.

And in this way the case fails. We cannot go into a detailed examination of the schedules to shew what the effect is, but the conclusion which we arrive at is that the statements in the case and the schedules entirely fail to prove the user by the inhabitants generally as inhabitants such as to justify the presumption of a grant by the Crown. We were not asked, and could not be asked, to presume a grant to such of the inhabitants as were not tenants of the manor.

We now go back to the title of the defendants by prescription. As regards the defendant Ferrett, as his house was a new one, this claim clearly could not be sustained. As regards the defendant Isaacs, the same objection really applied, because his house was also a new one, and although it was built near to an old house and upon a small garden belonging to it, the old house remained and was occupied, so that it was not in substitution for, but in addition to, the old house, and thus any prescriptive right acquired by the old house could not apply to this.

As regards the house occupied by the person under whom the remaining defendant Adams justifies the condition of things appears from paragraph 70 of the case. He occupies a house partly new and partly old, and it may be collected from the statement that the old part may originally, along with another old building, have constituted one house, or it may have been originally a separate house, and a question might arise whether a user was sufficiently made out in respect of the present house, so as to make the prescription apply. But an opinion was intimated in the course of the argument that there was no evidence of the exercise of the right to take haskets as belonging to any particular

house; on the contrary, it was proved that the right was exercised in respect of inhabitancy of houses, whether old or new. We should have felt justified in coming to the conclusion that Harriet Adams (1), as alleged in the 3rd plea, was seised in fee of the house occupied by her, and that it was not comprised in the lease of the 15th of March, 1781, mentioned in paragraph 68 of the case; but we could not have come to the conclusion that the other allegation in the plea was made out, viz., that she and her predecessor in title had exercised the right of taking estovers as to the messuage appertaining. This is a conclusion of fact, and though the actual taking of haskets by the occupiers of the house was proved to the fullest extent (see paragraph 71 of the case), and though the case does not expressly find in what alleged right it was taken, but leaves that to us, yet the evidence which we have now before us leaves no doubt as to this, as we have already stated in describing the other question, and shews that the right was exercised in respect of inhabitancy. The defendant in the action, Charles Adams, says (p. 150), "the common was free to everybody in the parish."

It is only necessary, upon this part of the case, to refer to the case of *Campbell* v. *Wilson* (2) (quoted with approval in *Angus* v. *Dalton* (3)) to shew the necessity of connecting the user with the right claimed. In that case there had been an inclosure award putting an end to all former rights of way, and a certain private right of way was set out. The question which arose was whether, from user for near the twenty years as of right a grant could properly be presumed, and the argument was that the user over the locus in quo was a user under the award and by mistaking the place set out. All the Court expressed their opinion that if it had been shewn that the user was in fact under the award, though adverse and of right, it could not have been made a foundation for presuming a grant. The language of all the judges is to the same effect, but that of Mr. Justice Lawrence is most precise. He says (4): "But it has been said that if the enjoyment were shewn to have originated in mistake, however adverse it may have

(1) The defendant Adams justified in the 3rd plea as the servant, and by command of Harriet Adams.

(2) 3 East, 294.

(3) 3 Q. B. D. at p. 108.

(4) 3 East, at p. 301.

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been, that is against the presumption, and that the learned judge misled the jury in this respect; but no facts appear to warrant this objection, otherwise it might be very material to be considered. For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time."

It is plain that if we refer the user to any other right than the one in respect of which it was actually exercised, we might be doing the greatest injustice. For the lord might allow the inhabitants of cottages to exercise the right as inhabitants, knowing that it was a right which could not be established in point of law, and which there was no necessity to interrupt; and he might afterwards be bound by his own interruption, because another right was acquired.

For the above reasons we think that all the questions at the end of the case must be answered in the negative, and that there must be judgment for the plaintiff in all the actions. Acting upon the paragraph at the bottom of page 22 of the case, we direct that the plaintiff's costs be assessed equally between the three defendants.

The injunction prayed for by the plaintiff is granted. (1)

Solicitors for plaintiff: *Duncan, Murton, & Co.*
Solicitors for defendants: *Horne & Hunter.*

(1) To restrain the defendants from repeating the trespasses.

THE

LAW REPORTS.

Exchequer Division.

REPORTED BY

JAMES M. MOORSOM AND ALEXANDER MORTIMER,
BARRISTERS-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,
BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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OF

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The Right Hon. Sir Fitzroy Kelly, Lord Chief Baron, President.
Sir Anthony Cleasby, Knt.
Sir Charles Edward Pollock, Knt.
Sir John Walter Huddleston, Knt.
Sir Henry Hawkins, Knt.

ATTORNEY GENERAL:

Sir John Holker, Knt.

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Sir Hardinge Stanley Giffard, Knt.

JUDGES

OF

THE COURT OF APPEAL.

XLII VICTORIA.

Lord CAIRNS, Lord Chancellor.

Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., Lord Chief Justice of England.

Sir GEORGE JESSEL, Master of the Rolls.

Lord COLERIDGE, Lord Chief Justice of the Common Pleas.

Sir FITZROY KELLY, Lord Chief Baron of the Exchequer.

Sir WILLIAM MILBOURNE JAMES,
Sir RICHARD BAGGALLAY,
Sir GEORGE WILSHERE BRAMWELL,
Sir WILLIAM BALIOL BRETT,
Sir HENRY COTTON,
The Honourable ALFRED HENRY THESIGER,

} Ordinary Judges of Court of Appeal.

ERRATA.

Page	*Lines*	*For*	*Read*
133	3 and 13, from top	Common Law Procedure Act, 1854, s. 61	Rules of Supreme Court, Order XLV. rule 2.
283	11, from bottom	"does necessarily include"	"does not necessarily include."

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CASES

DETERMINED BY THE

EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION

XLII VICTORIA.

WELLS *v.* THE MITCHAM AND WIMBLEDON DISTRICT GAS LIGHT COMPANY AND ANOTHER. 1878 *Nov.* 4.

Costs — Reference — Shorthand Writers' Notes — Brief Copies for Counsel — Taxation—Rules of the Supreme Court (Costs).

Where an action is referred, the cost of brief copies of the transcript of shorthand writers' notes of each day's proceedings in the reference, made for the use of counsel, will not, in the absence of any order and of agreement between the parties, be allowed on taxation.

Croomes v. *Gore* (1 H. & N. 14) followed.

THIS was a motion to set aside an order of a judge at chambers, refusing to order the master to review his taxation.

The action was brought on a building contract, and with all matters in difference was referred to an arbitrator.

At the first meeting it was proposed by the plaintiff's solicitor to the defendants' solicitor that a shorthand writer's note should be taken on behalf of both parties. This was not agreed to, but a shorthand writer was employed by the plaintiff, and brief copies of the notes were furnished to the plaintiff's counsel. The plaintiff attended the reference with one counsel only.

By the award the plaintiff became entitled to his costs of the reference against the defendants. On taxation the plaintiff

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claimed, among other things, the costs of employing the shorthand writer, the cost of transcript of the notes, and the cost of brief copies of same for the use of counsel. The master disallowed the two former items, but allowed the latter, and on objection being made, under Rule 30 of the Rules of the Supreme Court (Costs), to the allowance of this last item, gave the following grounds of his decision:—

"In consequence of these objections I have reconsidered my allowance of the items objected to, but still consider they were rightfully allowed. Though the notes were used by the arbitrator, all that I have allowed is a copy of the evidence for counsel as the case progressed.

"It is true that solicitors' notes might have been shorter, but the defendants might well have objected to such notes being referred to, and the employment of a shorthand writer probably prevented the reference being prolonged to other meetings, or a second counsel might have been instructed to take a note of the evidence; but it appears to me that the expense would not have been less."

The learned judge at chambers declined to make an order to review the taxation, and the defendant appealed by way of motion to this Court.

J. Brown, Q.C., for the defendants. The usual practice is for the party desiring to have a shorthand writer's note to ask the other side to join in the expense. In the absence of any agreement these costs cannot be taxed against the defendants: *Croomes* v. *Gore* (1); *Kirkwood* v. *Webster*. (2)

Gates, Q.C., and *A. Cock*, for the plaintiff. This is a matter coming within the discretion of the master under Rule 29 of the Rules of the Supreme Court (costs), and the Court will not interfere: *Wakefield* v. *Brown*. (3) In effect these costs are really costs of additional instructions to counsel, and further, employing a shorthand writer has shortened the proceedings, and prevented the necessity for a second counsel to take notes.

J. Brown, Q.C., was not called on to reply.

(1) 1 H. & N. 14; 25 L. J. (Ex.) 267.
(2) 9 Ch. D. 239.
(3) Law Rep. 9 C. P. 410.

PER CURIAM (Kelly, C.B., and Cleasby, B.). The master must review his taxation. In the absence of any agreement between the parties, or an order of a judge or the Court, the rule laid down in *Croomes* v. *Gore* (1) should be adhered to. The fact that the defendants might have had to pay an equivalent sum in the absence of these notes, in respect of costs otherwise incurred, ought not to be taken into account in determining their liability to these costs.

Order to set aside order of judge, and for master to review his taxation.

Solicitors for plaintiff: *Wilkins, Blyth, & Fanshawe.*
Solicitor for defendants: *J. J. Keily.*

HANCOCK *v.* GUERIN AND OTHERS. *Nov.* 5.

Practice—Discovery after Claim and before Defence—Rules: Order XXXI., Rule 12.

A plaintiff after delivering a statement of claim is not, as a general rule, entitled, under Order XXXI., Rule 12, of the Rules of the Supreme Court, to an order for discovery of documents before a statement of defence is delivered, because, until that happens, it is impossible to say what the matters "in question in the action" are.

THE statement of claim, delivered on the 24th of October, 1878, claimed 185*l.* for commission on sales of liquors effected by the plaintiff for the defendants as their agent. Before any defence was delivered, the plaintiff took out a summons for discovery of documents, which, on the 29th of October, was dismissed by Field, J. No affidavit was filed by either party upon this summons; but at the hearing before Field, J., an affidavit was referred to, which had been filed by the defendants in opposition to an unsuccessful application made in September by the plaintiff for leave to sign final judgment under Order XIV. This affidavit alleged that the defendants owed nothing to the plaintiff; that the greater part of this claim was for commission on the sale of certain brandy; that this sale was effected, not by the plaintiff,

(1) 1 H. & N. 14.

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but by another agent of the defendants; that the order for the brandy was confirmed by a letter of the 23rd of February, 1877, addressed by the purchaser to the defendants personally; and that the plaintiff was entitled to no commission. The plaintiff moved to rescind the order of Field, J., dismissing the summons.

C. C. Scott, for the plaintiff. The plaintiff is entitled to discovery of documents as a matter of right and without filing any affidavit, under the Judicature Act, 1873, Order XXXI., Rule 12. (1) Field, J., refused the application, on the ground that no statement of defence had yet been delivered. In *Mercier* v. *Cotton* (2), an action for libel, it was held that interrogatories delivered under Order XXXI., Rule 1, before the defence was delivered were properly struck out under Rule 5, on the ground that it was probable the defendant would admit the publication of the libel and all the facts, and render the interrogatories unnecessary. But here the defendants' affidavit, filed for another purpose, shews that they intend to dispute the whole claim and sets up a document in answer. That document the plaintiff desires to see, in order to discover if it be genuine. In *Cashin* v. *Craddock* (3), Bacon, V.C., held that a plaintiff would not in general be allowed *production* of documents until he has delivered a statement of claim, to which the defendant may demur if he thinks fit, implying that he would be so entitled when he has delivered it. Discovery necessarily precedes production; therefore, à fortiori, a plaintiff is entitled to discovery when he has delivered a statement of claim. The practice upon such applications is to adjourn it till a statement of defence is delivered, and if the Court does not grant the application, that is the proper course.

Kemp, Q.C., for the defendant, was not heard.

KELLY, C.B. This appeal must be dismissed. Order XXXI., Rule 12, enables a party to apply to a judge for an order for discovery of the documents "relating to any matter in question in

(1) By this rule "any party may without filing any affidavit apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action."

(2) 1 Q. B. D. 442.

(3) 2 Ch. D. 140.

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the action." How can the judge know what the matters in question are, unless under some very special circumstances, until the statement of defence is delivered? And unless the matters in question are known, how can it be known whether documents, which may or may not bear upon them, relate to the matters in question? I think, therefore, that in the present case the plaintiff is not entitled to the order.

CLEASBY, B. The foundation of this application was that something had taken place, on the proceedings for leave to sign judgment under Order XIV., which would give a clear idea of what the matters in dispute were. That is not sufficient without a special affidavit, shewing that it was for some reason important to have at once an affidavit by the defendants of what documents are in their possession or power relating to any matter in question in the action. Order XXXI., Rule 12, says the application may be made "without filing any affidavit," but if it is made without an affidavit, it must comply strictly with the terms of the rule, and shew what the matters in question are.

Appeal dismissed with costs.

Solicitor for plaintiff: *G. Johnson.*
Solicitors for defendants: *Crook & Smith.*

CROWHURST *v.* THE BURIAL BOARD OF THE PARISH OF AMERSHAM.

Nov. 8.

Nuisance—Injury to Cattle—Projection of Poisonous Trees over Neighbour's Land—Maxim, "Sic utere tuo ut alienum non lædas."

The defendants, a burial board, planted on their own land and about four feet distant from their boundary railings a yew tree, which grew through and beyond the railings, so as to project over an adjoining meadow, which was hired by the plaintiff for pasture. The plaintiff's horse, feeding in the meadow, ate of that portion of the yew tree which projected over the meadow, and died of the poison contained therein. The tree was planted and grown with the knowledge of the defendants. The plaintiff having brought an action for the value of the horse:—

Held, that the defendants were liable on the principle of the maxim, "Sic utere tuo ut alienum non lædas."

CASE stated by the judge of the county court of Bucks.

This is an action to recover 30*l.* damages for the loss of a horse.

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CROWHURST v. AMERSHAM BURIAL BOARD.

1. The defendants are owners and occupiers of about half an acre of land at Amersham, Bucks, which has been used for a cemetery for about seventeen years. It was constructed and used by the defendants, being a burial board, as a place of interment under the statutes applicable in that behalf.

2. The plaintiff has been tenant for the last two years, and some time previously for a period of three years, of a meadow adjoining the cemetery, and has used the meadow for pasture for his horses, and frequently visited the same.

3. The defendant's cemetery is separated from the plaintiff's meadow by a wall about two feet high, and at two places by an open iron railing about two feet high upon the wall. The wall and railing were constructed by and belong to the defendants, and when the cemetery was laid out about seventeen years ago, the defendants planted two yew trees about four feet within their fence, but which had grown through and beyond the iron railings so forming the defendant's boundary, and projected on or over the meadow in the plaintiff's occupation.

4. A horse belonging to the plaintiff had been turned out in the meadow for some months immediately preceding the 26th of September, 1877; and on that day the plaintiff saw the horse alive and well in the meadow.

5. On the morning of the 27th of September the horse (which was worth 21*l.*) was found dead in the meadow, having been poisoned by eating the twigs of branches and leaves of one of the yew trees.

6. On the 27th of September it was found that the horse must have and had browsed on and eaten a quantity of twigs, branches, and leaves of one of the yew trees, the same extending through the rails into the meadow, and also a quantity of twigs, branches, and leaves of the same tree within the defendant's fence, and within such a distance that a horse could browse when standing in the plaintiff's meadow and reaching his neck and head over the wall and rails. The wall and rails were not at that spot sufficiently high to prevent a horse from so browsing. The other yew tree did not appear to have been interfered with.

7. It was contended by the plaintiff, that the defendants were liable for the consequences of their having allowed the branches

of poisonous trees like the yew to project on to the plaintiff's meadow, and also for the fence not being sufficient to keep cattle from eating the yew.

8. The plaintiff was not aware of the existence of yew trees.

9. That cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby, is a fact generally known.

10. It was contended by the defendants, first, that the plaintiff proved no obligation on the defendants, by grant, prescription, or otherwise, to maintain any fence whatever for the plaintiff's benefit, and that the defendants were not liable for the consequences of the plaintiff's horse eating the defendants' tree; secondly, that if there was any breach of duty on the defendants' part, the accident to the horse was directly attributable to the plaintiff's act in turning him into a meadow where he could get at the tree, and that either the damage was too remote, or the plaintiff directly contributed to it by negligence on his part and by his own act.

The judge (who tried the case without a jury) found that in fact there had been no contributory negligence on the part of the plaintiff, and that, under the circumstances above stated, the defendants were liable, and gave judgment for the plaintiff for 21*l.* and costs.

The question for the opinion of the Court was whether the defendants were liable. The judgment to be entered as regards the action and costs, and the costs of this appeal, as the Court may direct.

The case having, on the 6th of May, 1878, come on for argument, it was pointed out that it did not appear whether the horse died from eating of that part of the tree which projected over and into the plaintiff's meadow, or of that part which was strictly within the defendants' cemetery (the horse being able to reach the latter with ease), or whether he died of the combined effect of eating both parts. The case having been sent back for the county court judge to state the cause of the horse's death with reference to this point, he stated that although the horse might have, and probably had, eaten twigs, leaves, and portions of branches of the tree strictly within the defendants' cemetery, or (as the judge expressed it) "within the space formed by a perpen-

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dicular line drawn to or from the outmost edge or limit within the defendants' land and premises," yet he found as a fact that the twigs, leaves, and branches which projected beyond "the space formed," &c., over and into the plaintiff's meadow were of themselves alone amply sufficient to have caused the horse's death; and that, upon this finding, he gave judgment for the plaintiff.

June 25. *J. O. Griffits, Q.C.* (*Cooper Wyld,* with him), for the plaintiff.

G. Shaw (*Herschell, Q.C.,* with him), for the defendants.

The arguments sufficiently appear in the judgment. Besides the authorities there cited, *Pickering* v. *Rudd* (1) was referred to.

Cur. adv. vult.

Nov. 8. The judgment of the Court (Kelly, C.B., and Pollock, B.) was delivered by

KELLY, C.B. This is an appeal from the county court of Buckinghamshire, held at Chesham. The judgment in the Court below was for the plaintiff, damages 21*l.*, and the judge stated a case for our opinion. The material facts of this case are as follows. The defendants some seventeen years ago obtained a piece of land for the purposes of their cemetery, and fenced it round with a dwarf wall in which at two places there were openings filled up with iron railings about two feet high. Where these railings occurred the defendants planted two yew trees, about four feet distant from the railing. These grew through and beyond the railings, so as to project over an adjoining meadow. The plaintiff, two years before the alleged cause of action, hired the meadow to pasture his horses for a term of three years. After he had occupied it for two years, his horse, which was feeding in the meadow, ate of that portion of one of the yew trees which projected over the meadow —the wall and rails not being sufficiently high to prevent a horse from so eating—and died from the effects of the poison contained in what he ate. The question for our determination is, whether the death of the horse, so occasioned, afforded any cause of action against the defendants. There being no pleadings in the county court, the question is not in any way affected by the form in which

(1) 1 Stark. 56.

the cause of action is put forward, and the facts, as found by the judge of the county court, must be taken as conclusive. The only matter, therefore, for our decision is whether, upon those facts, any legal liability is disclosed. The matter might appear to be somewhat trivial, but the case gives rise to a question which may not unfrequently arise, and therefore is of some general importance. Considering this, it is remarkable that there is an absence of any immediate authority by which our decision should be governed, and it is therefore necessary to determine what are the principles of law properly applicable to it.

Before doing this, it may be well to state shortly what we apprehend to be the effect of the finding of the county court judge. In the first place, we consider that the judge has so found the facts, as to the planting and growth of the yew trees, as to preclude the supposition of mere accident: and that the trees must be taken so to have been planted and grown, with the knowledge of the defendants, as to make them responsible for whatever might be the direct consequence of the original planting. Secondly, although it is found that the plaintiff saw the horse in the meadow the day before it died, it is also found that he was not aware of the existence of the yew trees, and we think it must be taken that any such negligence on the part of the plaintiff as would disentitle him to recover is negatived. The mere fact that the plaintiff saw the horse in the field would go for nothing, and we do not think that he was bound to examine all the boundaries so as to see that no tree likely to be injurious to his horse was projecting over the field he had hired.

It ought also to be noticed that the decision in no way depends upon any question of fencing, or the correlative rights and duties arising therefrom, and therefore the cases which were cited to us based upon these afford no assistance.

The question seems to resolve itself into this: Was the act of the defendants in originally planting the tree, or the omission to keep it within their own boundary, a legal wrong against the occupier of the adjoining field, which, when damage arose from it, would give the latter a cause of action?

On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in

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its natural course, is so usual and ordinary that a court of law ought not to decide that it can be made the subject-matter of an action, especially when an adjoining landowner over whose property it grew would, according to the authorities, have the remedy in his own hands by clipping.

On the other hand, the plaintiff may fairly urge that what was done was a curtailment of his rights which, had he known of it, would prevent his using the field for the purpose for which he had hired it, or would impose upon him the unusual burden of tethering or watching his cattle, or of trimming the trees in question. And although the right so to trim may be conceded, this does not dispose of the case, as the watching to see when trimming would be necessary, and the operation of trimming, are burdens which ought not to be cast upon a neighbour by the acts of an adjoining owner. It may also be said that if the trees were innocuous, it might well be held, from grounds of general convenience, that the occupier of the land projected over would have no right of action, but should be left to protect himself by clipping. Such projections are innumerable throughout the country, and no such action has ever been maintained; but the occupier ought, from similar grounds of general convenience, to be allowed to turn out his cattle, acting upon the assumption that none but innocuous trees are permitted to project over his land.

The principle by which such a case is to be governed is carefully expressed in the judgment of the Exchequer Chamber in *Fletcher* v. *Rylands* (1), where it is said, "We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril; and if he does not do so is primâ facie answerable for all the damage which is the natural consequence of its escape." This statement of the law was cited and approved of in the judgment of the House of Lords in the same case (2). In *Fletcher* v. *Rylands* (1) the act of the defendant complained of was the collecting in a reservoir a large quantity of water, which burst its bounds and flowed into the plaintiff's mine; but though the degree of caution required may vary in each particular case the principle upon which the duty

(1) Law Rep. 1 Ex. at p. 279. (2) Law Rep. 3 H. L. at p. 339.

depends must be the same, and it has been applied under many and varied circumstances of a more ordinary kind: as in *Aldred's Case* (1), where the wrong complained of was the building of a house for hogs so near to the plaintiff's premises as to be a nuisance; the user of a lime-kiln and lime-pit for tanning or a dye-house (2); the laying of dung so high as to damage a neighbour, *Tenant* v. *Goldwin* (3): and others which are cited in Comyns' Digest "action on the case for a nuisance," and in the judgment in *Fletcher* v. *Rylands* (4); in all which cases the maxim "Sic utere tuo ut alienum non lædas" was considered to apply; and those who so interfere with the enjoyment by their neighbours of their premises were held liable.

Other cases of a similar kind may be found in the books. Thus, in *Tubervil* v. *Stamp* (5), it was held that an action lay by one whose corn was burnt by the negligent management of a fire upon his neighbour's ground, although one of the judges did not agree in the decision, upon the ground that it was usual for farmers to burn stubble. In *Lambert* v. *Bessey* (6) the action was in Trespass qu. cl. fregit. The defendant pleaded that he had land adjoining the plaintiff's close and upon it a hedge of thorns; that he cut the thorns, and that they ipso invito fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer judgment was given for the plaintiff on the ground that though a man do a lawful thing, yet if any damage thereby befalls another he shall be answerable if he could have avoided it. This case was alluded to and approved of by Lord Cranworth in his judgment in the House of Lords in *Rylands* v. *Fletcher* (7), where he says, "The doctrine is founded on good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer." It does not appear from the case what evidence was given in the county court to prove, either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge amongst persons who have to do with cattle. As to the defendants' knowledge it would be

(1) 9 Rep. 57 b.
(2) 2 Roll. 141.
(3) 1 Salk. 361.
(4) Law Rep. 1 Ex. at p. 279.
(5) 1 Salk. 13.
(6) Sir T. Raym. 421.
(7) 3 H. L. at p. 341.

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immaterial, as whether they knew it or not they must be held responsible for the natural consequences of their own act. It is, however, distinctly found by the judge "that cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby is a fact generally known;" and by this finding, which certainly is in accordance with experience, we are bound. Several cases were cited during the argument. In two of these, *Lawrence* v. *Jenkins* (1) and *Firth* v. *Bowling Iron Co.* (2), the liability of the defendant was based upon his duty to fence. These, therefore, as I have already said, throw no light upon the present question. In *Wilson* v. *Newbury* (3), which arose upon demurrer to a declaration, the Court merely decided that an averment that clippings from the defendant's yew trees got upon the plaintiff's land was insufficient, without shewing that they were placed there by or with the knowledge of the defendant. Mr. Justice Mellor, however, in giving judgment says, after alluding to *Fletcher* v. *Rylands* (4), "If a person brings on to his own land things which have a tendency to escape and to do mischief, he must take care that they do not get on his neighbour's land."

Another case which was cited during the argument was that of *Erskine* v. *Adeane* (5), in which the Court of Appeal held that a warranty could not be implied by the lessor of land, let for agricultural purposes, that there were no plants likely to be injurious to cattle, such as yew trees, growing on the premises demised. This decision obviously rests upon grounds foreign to those by which the present case should be determined. We notice it, therefore, only that we may not appear to have overlooked it.

In the result we think that the judgment of the county court was correct, and that it should be affirmed with costs.

Judgment for the plaintiff affirmed.

Solicitor for plaintiff: *Cox, for D. Clarke, High Wycombe.*

Solicitors for defendants: *Allen & Edwards, for Bedford, Amersham.*

(1) Law Rep. 8 Q. B. 274.
(2) 3 C. P. D. 254.
(3) Law Rep. 7 Q. B. at p. 33.
(4) Law Rep. 1 Ex. at p. 279.
(5) Law Rep. 8 Ch. 756.

WHITEHEAD, APPELLANT; HOLDSWORTH AND ANOTHER, RESPONDENTS. 1878

Coal Mine — Check-weigher — Removal — Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 18. *Nov.* 8.

The appellant, who was a miner in the respondents' coal mine, was appointed check-weigher by the other miners under the provisions of s. 18 of the Coal Mines Regulation Act, 1872, and acted in that capacity, and was paid by the miners. Subsequently the respondents dismissed all the miners and closed the mine. No notice was given to the appellant by the respondents, or by or on behalf of the miners. On the mine being reopened a short time afterwards, the appellant claimed to be still check-weigher and to be entitled to perform the duties of that office, and brought an action against the respondents for preventing his doing so:—

Held, that the appellant had, on the dismissal of the miners, ceased to be check-weigher, and that the action could not be maintained.

IN an action in a county court to recover damages sustained by the plaintiff, by reason of the defendants preventing him from acting in his capacity as check-weigher on the part of the miners employed in the Beckett Street Colliery, belonging to the defendants, the judge gave judgment for the defendants, subject to the following case:—

1. The defendants are the owners of a coal mine called the Beckett Street Colliery.

2. On the 4th of March, 1875, the plaintiff, who was at that time a miner employed in the colliery, was, under section 18 of the Coal Mines Regulation Act, 1872 (1), duly appointed by the

(1) 35 & 36 Vict. c. 76, s. 18, enacts: "The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as a check-weigher) at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed. The check-weigher shall be one of the persons employed either in the mine at which he is so stationed or in another mine belonging to the owner of that mine. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed; and if in any mine proper facilities are not afforded to the check-weigher as required by this section, the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means by enforcing to the best of his power the provisions of this section to prevent such contravention or non-compliance.

"The check-weigher shall not be

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miners employed in the colliery to act as check-weigher on their behalf.

3. From the 4th of March, 1875, down to the 17th of May, 1877, the plaintiff acted as such check-weigher, receiving a weekly wage of 31*s.* paid to him by an association to which all the miners belonged, on behalf of the miners employed in the colliery.

4. On the 10th of May, 1877, the defendants gave notice to each of the miners in the colliery determining their service at the expiration of seven days from that date.

5. After the expiration of the notice, and after the miners had delivered up their tools to the defendants, viz. on the 18th of May, 1877, and again on the 19th the defendants re-engaged all the old hands except six, and one or two fresh ones in addition, upon the same terms, and accordingly the miners so re-engaged, and the fresh hands, commenced to work for the defendants. No notice of any kind was given to the plaintiff by the defendants, or by or on behalf of the miners.

6. Upon the 19th of May, 1877, the defendants prevented the plaintiff from acting as check-weigher on behalf of the miners,

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authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing, but shall be authorized only to take such account as aforesaid, and the absence of the check-weigher shall not be a reason for interrupting or delaying such weighing.

"If the owner, agent, or manager of the mine desires the removal of a check-weigher on the ground that such check-weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or has otherwise misconducted himself, he may complain to any court of summary jurisdiction, who, if of opinion that the owner, agent, or manager, shews sufficient primâ facie ground for the removal of such check-weigher, shall call upon the check-weigher to shew cause against his removal. On the hearing of the case, the Court shall hear the parties, and if they think that at the hearing sufficient ground is shewn by the owner, agent, or manager to justify the removal of the check-weigher, shall make a summary order for his removal, and the check-weigher shall thereupon be removed, but without prejudice to the stationing of another check-weigher in his place. The Court may in every case make such order as to the costs of the proceedings as they think fit.

"If in pursuance of any order of exemption made by a Secretary of State, the persons employed in a mine to which this Act applies are paid by the measure or gauge of the material gotten by them, the provisions of this section shall apply in like manner as if the term 'weighing' included measuring and gauging, and the terms relating to weighing shall be construed accordingly."

and from having access to the colliery and the premises attached thereto, and from having any facility or opportunity for taking an account of the coal gotten by the miners employed at the colliery, and thereby prevented the plaintiff from receiving his wages.

7. The judge of the county court ruled that, on the facts above stated, the plaintiff had by virtue of the notice of the 10th of May, 1877, ceased to be duly appointed check-weigher on behalf of the miners, and not being on the 19th of May, 1877, in the employ of the defendants, the plaintiff could not be appointed and was not such check-weigher, and had no right of access to the colliery or the premises attached thereto.

The question for the opinion of the Court was, whether, upon the facts above stated, the plaintiff was on the 19th of May, 1877, duly appointed check-weigher on behalf of the miners.

Sanderson Tennant (*G. Hardy*, with him), for the appellant. The statute points out the manner in which a check-weigher can be dismissed by the mine-owner; the appellant has not been dismissed in that way nor by his employers, and consequently when the mine was reopened he had a right to resume his employment. If it were not so, the masters would have an easy way of evading the Act and getting rid of a check-weigher by closing the mine; then when the miners are re-engaged, the check-weigher, not being a servant to the mine-owner, could not be reappointed by the men.

Lofthouse, for the respondents, was not called on.

KELLY, C.B. With some regret I have come to the conclusion that the county court judge was right, and that the appellant ceased to be check-weigher as soon as the body of persons who employed him were dismissed, and whether a day or six months intervened between the extinction of the old body of workers in the mine and the creation of a new body, does not in my judgment affect the matter. The new body may appoint a check-weigher, but if they do not, the appellant would not by reason thereof remain in an office which had in fact ceased to exist while the mine was closed. I quite see that this may put it in the power of a master to get rid of a check-weigher who is objectionable to

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him, but on the other hand the owner may, if he pleases, shut up his mine for as long or short a time as he chooses; and it cannot be that when the mine is opened again under different circumstances, and perhaps with different workmen, the check-weigher can claim that his appointment has continued through the interval.

CLEASBY, B., concurred.

Appeal dismissed.

Solicitor for appellant: *J. W. Hickin, for W. J. Clegg & Sons, Sheffield.*

Solicitors for respondents: *Paterson, Snow, & Bloxam, for Dibb, Atkinson, & Braithwaite, Leeds.*

Nov. 14.

INSLEY *v.* JONES.

Practice—Sending Case to County Court—Claim indorsed on Writ—Condition as to Costs of Trial—County Court Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 7.

A claim indorsed on a writ of "50*l.* and interest at the rate of 5*l.* per cent. per annum from the date hereof until payment or judgment," is a claim exceeding 50*l.* within the meaning of the County Court Act, 1867, s. 7, and the action cannot be sent to a county court under that section.

On an application at chambers, in such a case, to send the action to the county court, there is no power to impose a condition as to the costs of the trial in the superior Court.

APPEAL from an order of a judge at chambers.

The writ in the action was indorsed as follows: "The plaintiff's claim is for the return of the sum of 50*l.* paid by the plaintiff to the defendant under an alleged agreement dated the 26th day of April, 1878, and made between the defendant of the one part and the plaintiff of the other part. The plaintiff also claims interest on the above sum at the rate of 5*l.* per cent. per annum from the date hereof until payment or judgment, and the plaintiff also claims the same sum on accounts stated, and 2*l.* 17*s.* 6*d.* for costs; and if the amount claimed be paid to the plaintiff or his solicitors within four days from the service hereof, further proceedings will be stayed." (1)

(1) The latter part of the indorsement from the words "The plaintiff also claims interest," &c., were, with the exception of the amount of costs, printed.—See Order III., Rule 7.

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The defendant applied to a master for an order that the action should be tried in a county court under s. 7 of the County Court Act, 1867, which enacts that where in any action of contract brought or commenced in a superior court of common law "the claim indorsed on the writ does not exceed 50*l.*" a judge at chambers shall, unless there be good cause to the contrary, order such action to be tried in the county court or one of the county courts in which the action might have been commenced. The master refused the application, and the defendant appealed to Lindley, J., who dismissed the appeal, but added to his order, "but if only 50*l.* is recovered, the plaintiff to be only entitled to county court costs, unless the judge at the trial otherwise directs."

The plaintiff appealed to the Court by way of motion against so much of this order as imposed the condition as to costs.

Bigham, for the plaintiff. The order of the master was right, and the appeal against it ought to have been dismissed, without the imposition of the term as to costs which there is no authority to make. Interest can only be recovered if demanded in writing, 3 & 4 Wm. 4, c. 42, s. 28, but the demand on the writ is sufficient: *Pierce* v. *Fothergill.* (1) There is, therefore, a claim indorsed on this writ for more than 50*l.*, and the case cannot be sent to the county court.

C. H. Anderson, for the defendant. The claim mentioned in s. 7 as indorsed on the writ is for that which is due at that date. This claim for interest was not due then, and it may or may not be given by the jury. It ought not therefore to stand in the way of the defendant's right to have the case heard in a county court.

Bigham, in reply. The contention on behalf of the defendant confuses two things, "cause of action," and "claim indorsed on the writ." [He cited *Rodway* v. *Lucas.* (2)]

PER CURIAM (Kelly, C.B., and Cleasby, B.) The claim indorsed on the writ exceeds 50*l.*, and consequently the action cannot be sent to the county court under s. 7 of the County Court Act, 1867. The order of the learned judge will be set aside, so far as

(1) 1 Hodges, 251. (2) 10 Ex. 667; 24 L. J. Ex. 155.

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the condition goes which there was no power to impose, and the order made by the master must stand.

Appeal allowed.

Solicitors for plaintiff: *Goldring & Jukes, for E. & A. Caddick, West Bromwich.*

Solicitor for defendant: *G. S. Warmington.*

Nov. 15.

THOMAS AND ANOTHER *v.* LEWIS.

Ship and Shipping—Ship's Husband, Authority of, to bind Owner by cancelling Charterparty.

A ship's husband, who has the authority of the owners of the ship to enter into a charterparty, and has accordingly made a charterparty by which commission on the freight, primage, and demurrage is stipulated to be due to the charterers on the execution of the charterparty, has not, without the express sanction of the owners, power to bind them by an agreement to cancel the charterparty and pay the charterers a sum in lieu of commission, although such agreement is for the benefit of the owners.

CASE stated by the judge of the county court of Monmouthshire, held at Newport.

The action was for 24*l.* The defendant was part-owner of a vessel of which Rees had been, in writing, appointed ship's husband by the defendant and three other part-owners of the ship. Rees, as such ship's husband, entered into a charterparty with the plaintiffs, dated the 9th of February, 1876, the vessel being then at Amsterdam, whereby it was stipulated that the vessel should with all convenient speed proceed in ballast to Scarborough, Tobago, for orders, load a full and complete cargo of sugar $\frac{\text{and}}{\text{or}}$ other lawful produce, timber and cotton excepted; the vessel to proceed to Queenstown, or any convenient port of call, for orders, to be given in reply to captain's telegram, to discharge at one safe port in the United Kingdom, and discharge in such dock as charterers appoint, and deliver the same on being paid freight at a certain rate. It was stipulated by the charterparty that should the vessel not arrive in Tobago by the 1st of April, charterers' agent to have the option of cancelling or confirming the charterparty, and that 5 per cent. commission on the amount of freight,

primage, and demurrage, was due on the execution and signment of the charterparty, and to be paid to the plaintiffs, ship lost or not lost.

The ship being at Amsterdam, Rees informed the plaintiffs that she could not get to Tobago in the time named in the charterparty, and that if she was not there in time she might not get a cargo; and in March, at the request of Rees, the plaintiffs agreed to and did cancel the charterparty, upon the express agreement of Rees to pay 24*l.*, being the sum which it was estimated the commission at 5 per cent. on the freight, together with the stamp on the charterparty, would amount to if the charter were carried out. This sum was to be paid forthwith in cash by Rees, as such ship's husband, but he neglected to do so; and on the 29th of July, 1876, he gave the plaintiff's agent a promissory note in his own name, payable one month after date, for 24*l.*, which was still unpaid. Evidence was given that the cancellation of the charterparty was for the benefit of the owners.

It was contended for the plaintiffs that they had done all on their part to be done to entitle them to be paid the commission, and that their right to recover the commission accrued immediately upon the execution and signment of the charterparty, and existed at the time of the cancellation, and did not depend upon the cancellation, and that the charterparty was only cancelled upon the express agreement of Rees to pay the commission. That it was within the scope of the authority of Rees, as ship's husband to cancel the charterparty, and to agree upon the terms of such cancellation, more particularly as it was for the benefit of the vessel.

Each of the above points was contested on behalf of the defendant, and it was also contended that the plaintiffs, in subsequently accepting Rees' promissory note, adopted him as the person liable to them, and therefore discharged the owners of the vessel, and that the transaction was a personal one between the plaintiffs and Rees; that Rees absconded in November, 1876, and although the promissory note became due prior to that date no claim was made against the owners of the ship until after Rees had absconded.

The judge held that though Rees had, as ship's husband, authority to charter the vessel, he was not empowered to pledge his

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owners' credit for the payment of a sum of money for the cancellation of the charterparty without their express sanction, that being a matter quite unusual, and out of the ordinary course, however advantageous the compromise effected might have been to the interest of all the owners; and as no special authority was proved to have been given, he nonsuited the plaintiffs.

The question for the Court was whether, under the circumstances, the plaintiffs were entitled to recover the 24*l.*

Anstie, for the plaintiffs. The question is whether a ship's husband, who has authority to bind the owners by effecting a charterparty, has authority to bind them by cancelling it and paying a sum in lieu of commission, where the arrangement is beneficial to the owners. There is no direct authority on the subject, but such decisions as exist are in principle in favour of the plaintiff's contention. The nearest is *Barker* v. *Highley* (1), where it was held that a ship's husband and managing owner has authority to bind his co-owner by giving a bail bond to release the ship from arrest in a suit for collision.

[CLEASBY, B. There the ship's husband was managing owner.]

But the judgment is not based on that. A part-owner of a ship is not the partner of his co-owners. A ship's husband and managing owner has authority to bind his co-owners by an order for necessaries: *Whitwell* v. *Perrin* (2). Also for work done to the ship, unless it be shewn that the dealing was that the ship's husband should be looked to exclusively: *Thompson* v. *Finden* (3); and the same principle underlies *Robinson* v. *Read* (4). If the plaintiffs were to treat this charterparty as still subsisting and sue the defendant on it, he could plead and prove rescission, and the plaintiffs would have no answer. The defendant has had all the advantage of the cancelling, and now seeks to avoid the burden. The ship being at Amsterdam, it may well be that the owners could not be communicated with in time to obtain their assent, as it does not appear where they were. There might be sixty-four, or any number of owners, and unless a ship's husband has the

(1) 15 C. B. (N.S.) 37; 32 L. J. (C.P.) 270.
(2) 4 C. B. (N.S.) 412.
(3) 4 C. & P. 158.
(4) 9 B. & C. 449.

authority to bind them, they may be involved in heavy loss before it is possible to consult them all. There can be no difference in principle between authority to make a contract and to put an end to it—the authority being given in each case for the convenience and benefit of the principal. It cannot be, as suggested by the defendant, that Rees was professing to bind himself alone, for since he was not part owner he would lose nothing by allowing the charterparty to continue on which he was not liable. No reason can be given why he should make himself personally liable. Unless the question of authority is the question for the Court, there was no need to state a case.

A. T. Lawrence, for the defendant. It is admitted that no authority exists in favour of the proposition that the ship's husband has authority, merely as such, to bind the owners by cancelling the contract. The nearest decision in point is *Campbell* v. *Stein* (1), where Lord Eldon held that he has no authority to pledge the owner to the expenses of a law suit. This case is cited with others in Abbott on Shipping, 11th ed. pp. 79, 80. In Story on Agency, § 35, it is said: "A ship's husband is sometimes appointed merely for the purpose of conducting the ordinary and necessary concerns of the ship on her return to her proper home port; such as making the proper entries at the custom house; superintending the landing of the cargo; procuring the proper surveys of damage; settling the freight; and other incidents connected with the discharge of the cargo, and the termination of the voyage. But generally the person designated as ship's husband has a much larger authority, and is understood to be the general agent of the owners in regard to all the affairs of the ship in the home port. As such general agent he is intrusted with authority to direct all proper repairs and equipments and outfits for the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all other acts necessary and proper to despatch her for and on her intended voyage. But his authority does not extend to the procuring of any policy of insurance on the ship, either in port or for the voyage, without some express or implied assent of the owner." It is usual to make charterparties,

(1) 6 Dow. at p. 135.

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but not to cancel them: the judge has found expressly that it is out of the usual course of business. The owner of a ship, after hearing that the ship's husband has made a charterparty, may well suppose that the charterparty will continue unless his consent is obtained to its termination, and that he will not be called upon for a sum of money without notice. The terms of the case, moreover, seem to imply that Rees did not profess to bind any one but himself.

KELLY, C.B. In one sense, the point we have to determine is entirely new, and I should feel much hesitation in holding, for the first time, that a ship's husband has the authority which has been contended for, there being no decision or dictum of any judge, and no authority, to that effect. A ship's husband has the authority of the ship's owners to procure a charterparty, and to make contracts for their benefit, but there his authority ceases; and though it might be very desirable and expedient where the ship's husband is on the spot and the owners are in a foreign country, and cannot be communicated with without loss of time, that the ship's husband should have power to cancel the charterparty on the best terms he can obtain, and it is perhaps to be regretted that he has not such a power, I cannot take upon myself to say, for the first time, that such a power exists, in the absence of any authority to that effect. I think the judgment must be affirmed.

CLEASBY, B. I am of the same opinion. I think a ship's husband has no authority to pay a particular sum for the cancellation of the charterparty, and I doubt if he has authority to cancel it at all. Rees was appointed ship's husband before the charterparty was made, and we may take it, therefore, that he had authority to enter into the charterparty. We have been referred to a passage in Bell's Commentaries, cited in Story on Agency (§ 35, n. 4), as to the general duties of a ship's husband, and they do not, as there stated, include any authority to put an end to the contract of charterparty. Bell says: "His powers, where not expressly limited, may be described generally as those requisite to the performance of the duties now enumerated. It may be observed, however—1. That without special powers he cannot

borrow money generally for the use of the ship; though he may settle the accounts of the creditors for furnishings, or grant bills for them which will form debts against the concern, whether he has funds in his hands or not with which he might have paid them. 2. That although he may, in the general case, levy the freight which is by the bill of lading payable on the delivery of the goods, it would seem that he will not have power to take bills for the freight and give up the possession and lien over the cargo, unless it has been so settled by charterparty, or unless he has special authority to give such indulgence. 3. That under general authority as ship's husband, he has no power to insure or to bind the owners for premiums, this requiring a special authority." (1) According to this authority, he seems to have power to act under the usual conditions: he can do whatever is necessary for *using* the ship.

It is, moreover, not clear upon the case whether the agreement to cancel the charterparty was made between the plaintiff and Rees in his individual capacity, or between them and him as agent of the owners. Having regard to the exceptional character of the arrangement, I should be inclined to think that the transaction was made entirely on the personal credit of Rees, and I think the fair inference from the circumstances is that he had no authority to bind the owners.

Judgment for the defendant.

Solicitors for plaintiffs: *J. White & Sons, for J. D. Pain & Son, Newport.*

Solicitors for defendant: *E. Warriner, for Gibbs & Llewellyn, Newport.*

(1) 1 Bell. Com. on Law of Scotland, bk. 3, pt. 1, ch. 4, p. 553, 7th ed.

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Nov. 18.

BLACK AND OTHERS, CLAIMANTS; HOMERSHAM, DEFENDANT.

Shares—Sale of—Dividends declared between Contract for Sale and Completion.

Shares of a company were sold by auction on the 1st of August, and a deposit was paid. By the conditions of sale, the purchase was to be completed on the 29th of August, which accordingly was done and the transfers signed. The conditions of sale were silent as to dividends, and, in the meanwhile, on the 24th of August, a dividend was declared in respect of a period antecedent to the sale by auction:—

Held, that the dividend belonged to the purchaser.

SPECIAL CASE, from which the following facts are taken.

On the 30th of June, 1877, the defendant was the registered holder of 251 shares in the Mitcham and Wimbledon District Gas Light Company. Some of these shares were sold by public auction on the 1st of August, 1877, and the remainder were sold on subsequent days prior to the 21st of August, 1877. All the sales were made and completed in accordance with printed particulars and conditions of sale, the third of which was as follows: "Each purchaser shall immediately pay into the auctioneer's hands a deposit of 20*l.* per cent. in part of his or her purchase-money, and sign an agreement for payment of the remainder on the 29th of August, 1877, at the office of the vendor's solicitor, when and where the purchases are to be completed, and in this respect time shall be of the essence of the contract." Another of the conditions of sale was, "If either of the purchasers neglect or fail to complete his purchase on the 29th of August, 1877, the deposit money shall be absolutely forfeited to the vendor."

In pursuance of a notice dated the 8th of August, 1877, the ordinary half yearly general meeting of the shareholders of the company was held on the 28th of August, 1877, when a dividend for the half year which ended the 30th of June, 1877, was declared. The transfer books of the company were closed from the 13th to the 28th of August.

No mention of any dividend was made either in the printed particulars and conditions of sale, or by the auctioneer, or by any other person on the defendant's behalf at the sales.

The claimants were the several purchasers of some of the shares and paid the balance of the purchase-money on the 29th of August,

but in the case of one of the claimants a transfer was executed to him on the 24th August.

The question for the opinion of the Court was, whether under these circumstances the claimants or the defendant were entitled to the dividend on the shares declared on the 28th of August, 1877.

Gore, for the claimants, was stopped.

Webster, Q.C. (*Candy*, with him), for the defendant. Dividends are profits earned from time to time in respect of the share property. These profits were earned during the time the defendant was owner, and he is entitled to them. The conditions of sale fixed the day for completion, and before that time the dividend was declared and became a debt due to the defendant: *De Gendre* v. *Kent* (1). By analogy to real property, the ordinary profits of these shares until the completion of the sale belonged to the vendor: *Poole* v. *Shergold* (2); and there can be no such thing as relation back where the conditions of sale fix the time for completion.

Gore, was not called on to reply.

KELLY, C.B.—I am clearly of opinion that the completion of the purchase has relation back to the time when the contract was made, which vested from that moment the right to the shares in the purchasers. They purchased the shares on that day and at that time, and at their then value, and when they paid the remainder of the purchase-money at the time fixed for completion they had a complete title to the shares as they bought them on the 1st of August. It is a different case from that of real property, and the suggested analogy does not, in my opinion, hold.

CLEASBY, B. I am of the same opinion. I think it would be very strange if the matter were determined otherwise; for we know that the value of such property falls immediately a dividend is paid. The purchaser bought at the value before dividend, and if he does not receive it, he will be paying so much more for his shares than he bargained for.

Judgment for the claimants.

Solicitors for claimants: *J. A. Girling, and Henry Kimber & Co.*
Solicitor for defendant: *W. Sturt.*

(1) Law Rep. 4 Eq. 283. (2) 1 Cox, 273.

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Nov. 19.

JAKEMAN *v.* COOK.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 49—*Order of Discharge—Promise for valuable consideration to pay Debt released by discharge.*

Where a debtor, after having obtained an order of discharge under the Bankruptcy Act, 1869, promises, for a new and valuable consideration, to pay a debt which by virtue of s. 49 has been released by the discharge, an action lies against him for the amount of the debt.

Heather v. *Webb* (2 C. P. D. 1) distinguished.

Case stated by the judge of the county court of Yorkshire, held at Sheffield.

The action was brought under s. 1 of the County Courts Act, 1875, to recover 16*l.* claimed by the particulars of demand as an "amount owing upon account rendered for meat sold and delivered."

On the 15th of November, 1873, there was due from the defendant to the plaintiff a sum of 14*l.* for meat sold and delivered. On that day the defendant instituted proceedings for liquidation by arrangement in the county court, and in December, 1873, the creditors passed a resolution that the affairs be liquidated by arrangement, and that the defendant's discharge be granted, which resolution was duly registered and certified by the registrar. Under the proceedings the plaintiff tendered a proof, which was admitted, for the above sum of 14*l.*, for meat sold and delivered, but no dividend was declared by the trustee, nor did the plaintiff receive any payment in respect thereof out of the defendant's estate.

Subsequently to his discharge, the defendant, about January or February, 1874, promised the plaintiff that if, notwithstanding the defendant's discharge and the plaintiff's proof, the plaintiff would continue to supply the defendant with meat on a running account as before, that is to say on credit when required, he, the defendant would pay to the plaintiff the whole of the 14*l.* The promise was by word of mouth only, and on the faith of it between February, 1874, and November, 1875, the plaintiff at intervals supplied the defendant with meat, as appeared by the particulars of demand, and the defendant paid the plaintiff

various sums on account from time to time till November, 1875, when there remained unpaid on a balance of account the sum of 16*l.*, the items being shewn on the particulars of demand.

The defendant paid 2*l.* into court, and contended that his discharge was a release of all liability for meat sold and delivered previous to the discharge. The judge gave judgment for the plaintiff for 14*l.*, being the sum claimed, less 2*l.* paid into court, on the ground that the old debt, though released by the discharge, had been revived by the subsequent promise, coupled with what the judge held to be a new consideration arising out of the fact that the plaintiff had, on the faith of the promise, supplied the defendant with other meat upon credit.

The question for the opinion of the Court was, whether upon the facts above stated the debt and liability of the defendant to the plaintiff, in respect of the meat sold and delivered previous to the discharge of the defendant, were in law revived, or, whether the discharge of the defendant under the liquidation proceedings was a good answer in law to the claim.

Bray, for the defendant. The question is, whether, when a debt has been released by an order of discharge in liquidation under the Bankruptcy Act of 1869, any action can be brought to recover the debt upon a promise to pay it made for good consideration. It cannot be denied that, independently of statute, such a promise could be sued on at common law, with or without a valuable consideration, the moral obligation to pay being a sufficient consideration to support the promise. But 6 Geo. 4, c. 16, s. 131, enacted that no bankrupt should be liable to pay any debt from which he had been discharged by his certificate, upon any contract, promise, or agreement, unless the contract, &c., were in writing and signed. The Act of 1849, 12 & 13 Vict. c. 106, s. 204, abolished the distinction between a verbal and a written promise, and enacted that no bankrupt should be liable upon any such promise; and the Act of 1861, 24 & 25 Vict. c. 134, s. 164, contained a similar enactment. All those Acts having been repealed, the question now turns on the Act of 1869, 32 & 33 Vict. c. 71, s. 49, by which "An order of discharge shall not release the bankrupt from any debt or liability incurred by

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means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts proveable under the bankruptcy" with certain exceptions . . . . "An order of discharge shall be sufficient evidence of the bankruptcy and of the validity of the proceedings thereon, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence." By s. 125, sub-s. 7, liquidation by arrangement has the same effect in this respect as bankruptcy. It was contended in *Heather* v. *Webb* (1) that, since s. 49 differs from the former Acts, an action may be maintained upon a promise to pay the old debt which had been discharged by the bankruptcy; but it was held that no such action could be maintained, and the Court cannot decide the present question in favour of the plaintiff without overruling that case. It must be conceded that the supply of new meat was a good consideration, but that addition makes no difference, as was held in *Evans* v. *Williams* (2) upon the Insolvent Debtor's Act, 7 Geo. 4, c. 57, s. 61. Even a bond (into the consideration for which it is unnecessary to look) given for a discharged debt cannot be sued on, as was held in *Kidson* v. *Turner* (3), upon s. 204 of the Act of 1849. The policy of the law being to prevent such actions, no consideration can avail to make a promise enforceable.

Woolf, for the plaintiff, was not heard.

KELLY, C.B. The provisions of the Bankruptcy Acts upon the question involved in this case being various, and differing in the different Acts, we must look closely at the words of the Act under which the question arises. One object of the Bankruptcy Acts was to enable a debtor who had given up all his property for the benefit of his creditors to obtain his discharge, so that he might begin the world again freed from all his obligations

(1) 2 C. P. D. 1. (2) 1 Cr. & M. 30.
(3) 3 H. & N. 581; 27 L. J. (Ex.) 492.

and protected from oppression by his creditors. Another object was to prevent frauds by the debtor in giving an undue preference to one creditor, and promising to pay him after the discharge to the prejudice of the general body of the creditors. Now such of the former Acts as contain express provisions on the point substantially differ from the Act now in force. By the first of those Acts, 6 Geo. 4, c. 16, no bankrupt was liable upon a promise to pay a debt discharged by a certificate, unless the promise were in writing. So far, therefore, as that Act went there was nothing contrary to the general policy of the law in bringing such an action, for it could be brought if the promise were written. By the Acts of 1849 and 1861 it was provided that no action could be brought on such a promise, whether verbal or written. Those Acts, however, were repealed, and the Act of 1869, by a simple and salutary enactment, provides that a debtor who gives up all his property to his creditors and obtains their assent, whether the proceedings be in bankruptcy or in liquidation, may, under certain conditions, obtain an absolute discharge from his debts. But is there anything to prevent him from doing that which is in itself praiseworthy, and which every man ought to do if he can—entering into an entirely new contract for ample consideration to pay his old debts? I can see nothing contrary to the spirit of the bankruptcy laws in a debtor, who has given up all his property and obtained his discharge, honestly making a new engagement to do justice to his creditors if he receives an adequate benefit. A man who is just recovering from liquidation proceedings may have great difficulty in knowing what to do to obtain support for himself and his family. It is of the greatest consequence to him to get the ordinary necessaries of life, but he has no credit. He says to one of his creditors, if you will supply me with food on credit I will pay you the old debt. Is not that a good consideration? I think it is. The contract is one of great benefit not only to the creditor but to himself, and there is nothing in s. 49 of the Bankruptcy Act of 1869 to prevent such a contract being enforced. I think, therefore, that the plaintiff is entitled to judgment.

CLEASBY, B. I am of the same opinion. Here is a contract to this effect: "If you will supply my family with meat upon credit,

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I will pay you my previous debt which has been discharged under the liquidation." There is a distinct promise, and a clear contract made upon good and valuable consideration. There is nothing in reason or law against such a contract, except so far as it may be prohibited or made unavailable by an Act of Parliament. Now, it is said that s. 49 of the Bankruptcy Act of 1869 has the effect of making the bankruptcy a defence to this action, and the defendant's case is rested on the authority of *Heather* v. *Webb*. (1) I should feel bound by that decision, but independently I should have come to the same conclusion. That was an action upon a simple promise to pay the old debt, a proceeding in a superior Court where there was a statement of claim. The defence set up the discharge obtained in the liquidation. The replication set up two answers: the second was that "since the close of the said proceedings the defendant promised and agreed to pay the full amount of the plaintiff's claim." The rest of the replication may be rejected, and the plaintiff's case considered to stand merely on the promise to pay the old claim. Under those circumstances, the Court held that s. 49 was an answer to the cause of action. There the cause of action occurred before the discharge, there being nothing since the discharge but a simple promise. Sect. 49 says: "in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge." It was held that there was nothing to exclude the operation of the section. That is the reason of the judgment, and with regard to the decision of Bacon, V.C., in *Jones* v. *Phelps* (2), Lord Coleridge says (3): "It is true that the case differed somewhat from this, inasmuch as it turned on the question whether the law previous to the present Act was applicable or the present law, but the Vice-Chancellor seems to have decided on the wider ground, that under the Act of 1869 a promise to pay a debt barred by bankruptcy was nudum pactum, as there was no consideration for it. Such authority, therefore, as there is, is in favour of the view we take." Lindley, J., says: "The plaintiff's counsel contends that the defendant cannot plead

(1) 2 C. P. D. 1. (2) 20 W. R. 92.

(3) 2 C. P. D. at p. 7.

in the language of the section that the cause of action occurred before his discharge, because the cause of action here is the subsequent promise to pay. This is no doubt a plausible way of putting the case, but whether it is correct depends on the meaning of the term 'cause of action.' The only cause of action mentioned in the writ of summons and the claim is clearly the old debt which accrued before the bankruptcy proceedings. This perhaps is a technicality, and might be met by an amendment, but I am of opinion that no amendment would make the case any better for the plaintiffs. It seems to me that the sense in which the term 'cause of action' is used in the statute must include cases where so much of the cause of action as constitutes the consideration for the promise has occurred before the discharge."

In the present case the cause of action did not occur before the discharge. The cause of action is the promise made and acted on after the discharge—made for a good consideration arising after the discharge. I do not think that s. 49 applies to a case like this, of a real bonâ fide contract for a valuable consideration.

Judgment for the plaintiff. (1)

Solicitors for plaintiff: *Layton & Jaques.*
Solicitor for defendant: *J. Cotton, for W. E. Tattershall, Sheffield.*

(1) Leave to appeal was refused.

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Nov. 18.

[IN THE COURT OF APPEAL.]

DAVIES AND OTHERS *v.* FELIX AND OTHERS.

Practice—Appeal—Misdirection—New Trial—Appeal against Judgment at Trial with Jury—Jurisdiction of Court of Appeal—Rules of the Supreme Court, Order XXXIX., Rule 1., *Order XL., Rule* 4.

During the trial of an action before a jury the judge was asked by the defendants' counsel to nonsuit the plaintiffs, or to direct a finding for the defendants, upon the ground that no evidence had been given in support of the plaintiffs' case; this the judge refused to do, and the jury found the issue left to them in favour of the plaintiffs. Upon the following day the judge directed judgment to be entered for the plaintiffs, and stated his reasons for holding that there was evidence to support the finding of the jury. The defendants appealed to the Court of Appeal against the judgment directed to be entered:—

Held, that the appeal would not lie; for the judgment was upon the face of it correct, so long as the finding stood unreversed, and the Court of Appeal has no power, in the first instance, to review the finding of a jury; and the defendants' ground of complaint being for misdirection, they ought to have applied to the Exchequer Division for a new trial under Order XXXIX., Rule 1.

Yetts v. *Foster* (3 C. P. D. 437) followed.

CLAIM alleged that David Evan, of Hendre, in the parish of Kilkennin, in the county of Cardigan, by his will dated the 19th of July, 1778, devised "all that messuage, tenement, and lands, with the appurtenances, commonly called and known by the name of Hendre, situate, lying, and being in the aforesaid parish and county, together with all and singular houses, outhouses, edifices, ways, waters, and watercourses, slangs, pieces, parcels, and places thereunto belonging," subject to certain limitations with an ultimate remainder "to my own right heirs for ever." The testator was seised in fee of Hendre, which, it was alleged, at that time comprised, amongst others, the parcels called by the respective names of Bwlchydwr, Llacaglas, Glanrhos, Mountaingate, Mounthope, and Bankbach. The preceding limitations became extinct or failed, and the plaintiffs were, with those defendants who defended as landlords, the right heirs of the testator. The plaintiffs claimed possession of the above-mentioned parts of Hendre and mesne profits.

The defence, amongst other allegations, denied that Hendre then comprised the places above-mentioned, or any of them.

The action came on for trial before Bramwell, L.J., and a jury, at the Glamorganshire summer assizes, 1877, held at Swansea, and the defendants contended that there was no evidence to go to the jury that the three parcels of land called respectively Llacaglas, Glanrhos, and Mountaingate formed in 1778 part of Hendre and passed under the devise above mentioned, and contended that the plaintiffs ought to be nonsuited, or that a finding ought to be directed for the defendants. The Lord Justice, however, declined to do this, and left it to the jury to find whether these three parcels of land were part of the property called or known as Hendre; the jury were of opinion that they were part of that property, and found for the plaintiffs for their undivided shares in the whole property sought to be recovered; but the Lord Justice declined to enter judgment on that day, because he wished to have time to consider whether there was any evidence to go to the jury with regard to Llacaglas, Glanrhos, and Mountaingate. On the following day the Lord Justice stated that he could not say that there was no evidence in the plaintiffs' favour to go to the jury, and also stated his reasons for coming to that conclusion. He directed judgment to be entered for the plaintiffs.

The defendants gave notice that "a motion will be made to the Court of Appeal by counsel for the defendants, by way of appeal from so much of the judgment of the High Court of Justice sitting at Swansea, and dated the 3rd of August, 1877, as relates to the places called Llacaglas, Glanrhos, and Mountaingate, and the mesne profits thereof respectively, that so much of the said judgment as aforesaid may be reversed or discharged, and that instead thereof judgment may be entered for the defendants with costs, or that so much of the said judgment as aforesaid may be reversed or varied, as to the Court of Appeal may seem meet."

B. T. Williams, Q.C. (*Coxon*, with him), for the plaintiffs. There is a preliminary objection to the hearing of this appeal. The jury found generally for the plaintiffs, and judgment was entered for them; that judgment is now appealed against, but the defendants' only contention will be that there was no evidence to go to the jury in support of the plaintiffs' claim, and that Bramwell, L.J., ought to have withdrawn the case from their

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consideration; this is not an objection to the judgment, but to the finding of the jury, on the ground that they were misdirected by the judge; and as this Court has no power to question the finding, they cannot afford the defendants the relief asked for. The defendants ought to have applied to the Exchequer Division for a new trial. This appeal is, in fact, governed by *Yetts* v. *Foster* (1), and upon a similar principle in *Etty* v. *Wilson* (2) this Court held that it had not power to set aside a nonsuit at a trial with a jury.

[BRETT, L.J, I do not think that *Etty* v. *Wilson* (2) has much bearing upon the case before us.]

The judgment is regular upon the face of it, and cannot be impeached whilst the finding stands unquestioned.

J. W. Bowen, Q.C., and *Kenelm E. Digby*, for the defendants. This appeal is not against the finding of the jury upon matters of fact, but against the decision of the judge at the trial upon the question of law, whether there was evidence fit to be laid before a jury in support of the plaintiffs' claim, and whether the plaintiffs ought to have been nonsuited, or whether a finding for the defendants ought to have been entered. The defendants do not now deny that if there was any evidence in the plaintiffs' favour the finding must stand, and in this sense they accept the finding of the jury as to the facts; what they wish to dispute is the decision of the judge upon the facts after the finding had been given, for that decision contained a statement of the reasons why he directed the merely formal judgment to be entered for the plaintiffs. The defendants' remedy, therefore, was by an appeal to this Court from the judgment, and not by an application to the Exchequer Division for an order for a new trial. In *Yetts* v. *Foster* (1) the defendant's alleged ground of complaint was clearly misdirection before the finding, and after the finding the judge merely directed judgment to be entered in accordance with it.

B. T. Williams, Q.C., did not reply.

JAMES, L.J. I regret that the costs of this appeal have been uselessly incurred through a misapprehension as to the proper course of procedure; the mistake has arisen from the introduction of a new system, but it is a mistake which we cannot cure. This

(1) 3 C. P. D. 437. (2) 3 Ex. D. 359.

is an appeal from a judgment directed to be entered in a cause tried before a jury; but it is objected by the plaintiffs' counsel that the defendants are in truth dissatisfied with the finding of the jury, and that the only remedy open to them is a new trial; for it cannot be disputed that the judgment which has been entered is correct, so long as the finding stands. The defendants' counsel are in effect driven to admit that their contention must in substance be that the plaintiffs ought to have been nonsuited, or at least that a finding for the defendants ought to have been directed; therefore, what they really claim, is a new trial upon the ground of misdirection. Upon this appeal we have no power to set aside the finding; we must take it to be correct; we have no jurisdiction to hear and decide upon the points which the defendants' counsel desire to argue; for they are in truth objections to the finding of the jury and not to the judgment directed to be entered by Lord Justice Bramwell. This appeal must be dismissed.

BRETT, L.J. We must take it that at the trial Lord Justice Bramwell was asked to direct a finding for the defendants or to nonsuit the plaintiffs, but that instead of so doing he left to the jury the question of parcel or no parcel. An appeal to this Court is based upon the assumption that the findings of the jury are right; but the present defendants complain that the finding at the trial was wrong; and therefore the only remedy, which they can obtain, is a new trial. Before the coming into operation of the Supreme Court of Judicature Acts, 1873, 1875, the Courts at Westminster could not direct a verdict to be entered, unless leave had been reserved at the trial; and the consent of the parties to the cause was implied upon the reservation of this leave; I do not think that under those statutes and the rules made in pursuance thereof this Court has jurisdiction to set aside the finding of a jury for one party and to order it to be entered for the other. The right of appeal to this Court is regulated by the Rules of the Supreme Court, Order XL., Rule 4 (1); but where the cause has been tried before a jury, the only applications allowed to be made

(1) By Rules of the Supreme Court, Order XXXIX., Rule 1: "Where, in an action in the Queen's Bench, Common Pleas, or Exchequer Division, there has been a trial by a jury, any application for a new trial shall be to a Divisional Court.

1a. Applications for new trials shall

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are against the judgment as entered upon the findings of the jury; and for the purpose of these applications the findings must be taken as correct. Order XL., Rule 4, does not enable the defendants to maintain this appeal, for the ground of their complaint is that the finding of the jury was wrong. The defendants might perhaps have obtained a new trial under Order XXXIX., Rule 1; but the application ought in the first instance to have been made to the Exchequer Division. We are not without authority upon this question, for *Yetts* v. *Foster* (1) is directly in point for our decision; and it seems to me upon authority, upon principle, and upon the construction of the Rules of the Supreme Court, that we cannot upon this appeal give the defendants the relief which they seek.

COTTON, L.J. I also think that this appeal cannot be maintained. In order to set right the alleged misdirection at the trial the defendants ought, within the prescribed time, to have applied, under Order XXXIX., Rule 1, of the Rules of the Supreme Court, to the Exchequer Division for a new trial; instead of so doing they have appealed, under Order XL., Rule 4, to this Court against the judgment entered in the cause.

JAMES, L.J. By way of supplement to the concluding remarks of Lord Justice Brett, I wish to say that in my opinion it is much more convenient that objections to findings of juries should in the first instance be considered in the High Court of Justice. Discussions as to findings necessarily involve discussions as to the

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be by motion calling on the opposite party to shew cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court or a judge shall enlarge the time:— . . . If the trial has taken place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings.

Order XL., Rule 4; "Where at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them."

(1) 3 C. P. D. 437.

facts, and as a matter of practice it is much better that the facts proved at a trial should be thoroughly sifted in a Divisional Court, before the judges of this Court are called upon to determine whether the findings of the jury can be upheld.

Appeal dismissed. (1)

Solicitors for plaintiffs: *Hayes, Twisden, Parker & Co., for Griffith Jones, Aberystwith*

Solicitors for defendants: *Paterson, Snow, & Bloxam, for W. H. Thomas, Aberystwith.*

[IN THE COURT OF APPEAL.]

Nov. 12.

FAIRCLOUGH *v.* MARSHALL.

Mortgagor and Mortgagee—Parties—Covenant not to open House as a Beer-house—Injunction—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 5.

A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee.

F., being owner of copyhold land, covenanted with S. to stand seised thereof in trust for him and his heirs, subject to a rent, and subject to a covenant by S. not to use any building erected thereon as a beer-house. All the estate of S. vested in the defendant. F. sold the land to the plaintiff, B. advancing the purchase-money, and it was conveyed to B., subject to a proviso for conveyance to the plaintiff upon payment by him to B. of the amount advanced. The defendant used the building erected upon the land as a beer-house:—

Held, that upon the general principles of equity, the plaintiff was entitled to restrain the defendant by injunction from using the building for that purpose without joining B.

Quære, whether the Judicature Act, 1873, s. 25, sub-s. 5, would have entitled the plaintiff to an injunction in his own name.

INJUNCTION to restrain the defendant from using a certain house as a beer-house.

At the trial at the Durham Summer Assizes, 1877, before Manisty, J., the following facts were proved:

In the year 1868, Fowler was the owner of certain copyhold

(1) The defendants, by notice of motion dated the 18th of November, 1878, applied to the Exchequer Division for an order extending the time for making an application for a new trial, notwithstanding that the time limited for making such application for a new trial had expired; the motion was, however, on the 26th of November, refused.

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land situate in the manor of Houghton, in the county of Durham, which he was laying out in plots for building purposes on a building scheme. Instead of granting in the usual way a lease for ninety-nine years, Fowler granted an equitable fee-simple of each plot, taking from the purchasers a covenant as to the way in which each plot should be used, intending that there should be a uniform practice with regard to all the building plots with which he was dealing; he also created an annual rent-charge issuing out of each plot.

In pursuance of this scheme, by a deed of the 14th of December, 1868, Fowler, in consideration of a sum of money paid to him, covenanted with T. Steel to stand and be seised of the piece of land in question upon certain trusts, the first thereof being to secure to Fowler, his heirs, sequels in right, and assigns an annual payment of 4*l.* 1*s.* issuing out of the ground, and subject thereto in trust for T. Steel, his heirs and assigns for ever; and T. Steel thereby covenanted for himself, his heirs and assigns, with Fowler, his heirs, sequels in right, and assigns to observe and perform certain rules and regulations prescribed by the deed. Amongst these rules and regulations was the following: "That no buildings for the time being on the said plot of ground shall at any time be used as a public-house, or tavern, beer-house, house for the sale of beer, or coffee-house, without the consent of the vendor, his heirs or assigns, in writing first had and obtained." The interest of Steel in the property was therefore that of an equitable owner of the plot in question, subject to a rent-charge.

The defendant was the assignee through divers mesne assignments of Steel, and he purchased with notice of the restrictive covenants.

Fowler after he had granted the plots in the manner mentioned sold the rents to divers persons. By a deed dated the 26th of November, 1876, after reciting that Fowler had, at the request of the purchasers of the rents, contracted with the plaintiff for the absolute sale to him of the annual rents and benefit of all the powers and remedies limited by the deeds conveying the building plots for securing the payment thereof and the benefit of the covenants and conditions, and also all the estate and interest whatsoever of Fowler and the purchasers of the rents in the

building plots at the price of 1445*l.*, and also after reciting that R. S. Briggs and C. J. Briggs had, at the request of the plaintiff, and in order to enable him to complete his purchase, agreed to lend him the sum of 1100*l.* upon having the repayment thereof with interest secured in manner thereinafter expressed, it was witnessed that in pursuance of the contract with the plaintiff, and in consideration of the sum of 1100*l.* paid by R. S. Briggs and C. J. Briggs to Fowler, at the request of the plaintiff, and also in consideration of the balance of the purchase-money paid by the plaintiff to Fowler, the rents amounting to 72*l.* 5*s.* 4*d.* (1), and also the benefit and advantage of the covenants and conditions contained in the deeds conveying the plots, and on the part of the purchasers of the plots to be observed and performed, were granted unto R. S. Briggs and C. J. Briggs, their heirs, &c., subject to the proviso for conveying the same to the plaintiff, his heirs, &c., thereinafter contained; and it was further witnessed that, for the considerations aforesaid, Fowler, with the consent of the purchasers of the rents, covenanted with R. S. Briggs and C. J. Briggs that he would surrender into the hands of the lord of the manor the building plots, including the plot belonging to the defendant, to the use of R. S. Briggs and C. J. Briggs. The deed contained a proviso that if the plaintiff should pay to R. S. Briggs and C. J. Briggs the sum of 1100*l.* with interest they should at his request and costs grant and assure the rents, and should surrender the building plots to the use of the plaintiff. The deed also contained a declaration of R. S. Briggs and C. J. Briggs that they were joint tenants of the 1100*l.* as well in equity as at law; and also a covenant by the defendant to R. S. Briggs and C. J. Briggs to pay the 1100*l.*, with a power of sale upon default.

By a surrender and admittance, dated the 24th of November, 1876, R. S. Briggs and C. J. Briggs were admitted tenants of the building plots by the lord of the manor of Houghton, Fowler having surrendered them to their use.

At the foot of the surrender was the following memorandum: "Be it remembered that the above-written surrender is made on the occasion of a sale to R. Fairclough, in consideration of 1445*l.*,

(1) That sum included the particular rent of 4*l.* 1*s.*

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and on the occasion of a mortgage to the said R. Fairclough to R. S. Briggs and C. J. Briggs for securing 1100*l.* and interest."

On the plot of ground purchased by the defendant from T. Steel a house had been erected, which had been converted into a beer-house; it was sought in this action, by an injunction, to restrain the defendant from using this house as a beer-house. It was admitted that Messrs. Briggs, the mortgagees, had not given notice to take possession, and that the plaintiff, as mortgagor, was in receipt of the rents.

On these facts it was contended, on behalf of the defendant, that the plaintiff could not maintain an action for an injunction, as he had no interest in the property. It was contended, on behalf of the plaintiff, that he was the beneficial owner in possession, and that at all events he was, by virtue of the Judicature Act, 1873, s. 25, sub-s. 5 (1), entitled to an injunction without joining the mortgagee.

The learned judge discharged the jury by consent, and reserved the case for further consideration.

After argument, the learned judge directed judgment to be entered for the defendant, on the ground that the plaintiff had not sufficient interest to maintain an action for an injunction; and also on the ground that s. 25, sub-s. 5, of the Judicature Act had no application to the case.

The plaintiff appealed.

Hemming, Q.C., *Wildey Wright*, and *Granger*, for the plaintiff. The question is whether the plaintiff has a right, either independently of the Judicature Act, 1873, or by the aid of s. 25, sub-s. 5 of that Act (1), to an injunction to restrain the defendant from opening a beer-house in disregard of the covenant contained in the conveyance to Steel, his predecessor in title. By the deed

(1) By s. 25, sub-s. 5 of the Judicature Act, 1873, a mortgagor entitled for the time being to the possession or receipt to the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

of the 14th of December, 1868, the legal estate is left in Fowler; he is to hold it to secure his rent-charge, and subject to that to hold it in trust for the purchaser Steel, and Steel binds himself not to set up a beer-house on the land. By the deed of the 24th of November, 1876, Messrs. Briggs, as mortgagees, have the legal estate, and the plaintiff, whenever he chooses to pay them off, may get the legal estate transferred to him. But neither the defendant nor any one through whom he claims has any legal estate; he has only the right to compel Messrs. Briggs and the plaintiff, to hold that legal estate for his benefit, subject to securing the rent of 4*l.* 1*s.*, and subject to the right to enforce the covenants. It will be contended on behalf of the defendant, first, that the burden of this covenant does not run with the land as against him; therefore he is not liable on it: secondly, that the right to compel the observance of the covenant did not pass to the plaintiff, because he has not the legal estate.

As to the first point, it is immaterial here whether the covenant runs with the land, so as to vest the benefit in the plaintiff and pass the burden upon the defendant. The rule is, beyond all question, if a man acquires possession of land, with notice of a restrictive covenant, he is just as much liable to be restrained from disregarding that covenant as if it had been his own covenant, or if it had been a covenant the burden of which ran with the land. That doctrine was fully established in the case of *Tulk* v. *Moxhay*. (1) It is not a breach of contract or covenant that is restrained, but a burden being imposed on the conscience of the person who acquires the land, with notice of the covenant, he is not permitted to commit a wrong and disregard the covenant. Whether it is a wrong done by a person who is bound not to do it by equitable considerations, or whether it is a wrong done by a person who has contracted not to do it, the Court of Equity in both cases equally restrains the commission of the wrong.

Secondly. It is not necesary for the plaintiff to shew that he has the legal estate; it is enough that he is a person interested in the estate or in the covenant, and who may be damnified by its being disregarded. The plaintiff is one of a class of persons

(1) 2 Phil. 774.

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intended to be benefited by this covenant, and he is entitled to its protection whether or not the legal estate is in him. Clearly the object of this covenant is to prevent this particular plot, and any portion of the whole building estate, from being deteriorated by the existence of a beer-house. Any owner of a plot of land of this building scheme has a sufficient interest to entitle him to ask for an injunction against the defendant for opening a beer-house. A fortiori, a person who acquires this identical plot has the largest possible interest in preventing the covenant from being disregarded. The owner of the equity of redemption has a larger interest than a mortgagee in enforcing the observance of the covenant; a mortgagee has only a pecuniary interest, and it is immaterial to him whether or not the estate is depreciated so long as it is large enough to satisfy the mortgage; while, as regards the mortgagor, anything that will injure the estate, even to the least degree, will injure him. The mortgagee is only an incumbrancer. A Court of Equity looks to the substance and not to the form, and if the beneficial owner asks for an injunction, it never inquires whether any one else is entitled. The person who has the largest interest is the person who ought to protect the estate, and it is the mortgagor whose interest it is most carefully to nurse it.

Thirdly. Section 25, sub-s. 5 of the Judicature Act, 1873, expressly allows the mortgagor to bring the action in his own name. The important words are, "may sue to prevent or recover damages in respect to any trespass or other wrong relative thereto in his own name." The complaint here is that the defendant is in possession of the land with notice of the covenant, and has done the plaintiff a wrong by disregarding it. It might be said, on the other side, that the words "wrong relative thereto," that is to the land do not cover this particular wrong. But there is an injury to the plaintiff which is not technically called a breach of covenant; it is a wrong done by the defendant; if it is a wrong done against the mortgagees the plaintiff under this section can sue for it in his own name.

Herschell, Q.C., and *McClymont* for the defendant. As to the first point, it is conceded that if the plaintiff has a sufficient interest to maintain an action for an injunction, the breach may be restrained, although the covenant does not run with the land.

But, secondly: the plaintiff has not such an interest as entitles him to bring this action for an injunction. The property was never conveyed to him, it was conveyed to the mortgagees, and not only does the deed convey the property to the Messrs. Briggs, but the benefit of the covenants are also assigned to them, and it is only they who can enforce their observance; for they are the legal owners and the assignees of the actual covenantee. There are many substantial reasons why the mortgagor should not be permitted to sue without the mortgagees. The closing of the beer-house might materially diminish their security. The fact that the business of beer-selling is carried on on the premises might be the very best security for the mortgagees' ground rents; and it might be, if this business was not carried on, the mortgagees would have no adequate security. The fact that such a business was carried on, might have been the inducement to the mortgagees to lend the money. It is not permitted to the plaintiff, who has merely an equity of redemption, behind the back of the mortgagees to restrain a use of the house which might be most beneficial to their security. If the mortgagees did not give their consent for an application for an injunction, a Court of Equity would not grant it at the mere solicitation of a mortgagor.

Thirdly. Sect. 25, sub-s. 5, does not empower a mortgagor to bring a suit in a case like the present. That section allows the mortgagor to sue in his own name in three instances: he may sue for the possession of the premises; or for the recovery of the rents and profits; and to prevent or recover damages in respect of any trespass or other wrong relative thereto, that is for trespass or other wrong in the nature of a tort. This clearly is not a wrong analogous to a trespass, which is the governing word of the section. Wrong means a wrong in the ordinary legal sense of the term and not a breach of covenant. Take the case of a covenant to repair and a breach of that covenant: that is just as much a wrong as the breach of the covenant in this case; surely the breach of covenant to repair would not be a wrong within the meaning of that word in sub-s. 5. The plaintiff therefore, having no title whatever, is not entitled to maintain this action.

Hemming, Q.C., in reply.

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BRAMWELL, L.J. With the greatest respect for my learned Brother Manisty, this judgment cannot be supported. In the first place, if the conveyance had been made to Fairclough in the terms in which it was made to the Messrs. Briggs and no money had been borrowed, and if there had been no relation of mortgagor and mortgagee, it is admitted that the plaintiff could have maintained this suit. But it is said the conveyance having been made to the Messrs. Briggs with a mere reservation to the plaintiff of a right to have a conveyance when he pays off the debt, the plaintiff is not in a position to ask for an injunction, at all events unless he joins the mortgagees. It was argued that this is not the ordinary case of a mortgagor and mortgagee; for a mortgagor is in the position of a man who has had an estate, and has parted with it; but here the plaintiff has never possessed any estate. But if we look to the substance of the thing and not the form only, we shall see that this is in point of fact the ordinary case of a mortgage. It is recited that Fowler has contracted with the plaintiff to purchase the estate; the conveyance is made to Messrs. Briggs because they have lent the money, and then there is a covenant to convey the estate to the plaintiff on repayment of the money, which is precisely like the ordinary covenant to re-convey; and then there is a covenant to pay the mortgage money. In substance there is no distinction, and we ought to treat the matter as an ordinary mortgage. The plaintiff is therefore entitled to ask for this injunction. Then must he join the mortgagees who have never interfered nor claimed a right to interfere in any way with the management of the estate? It is not shewn that the value of the security will be impaired by the injunction asked for, and so far as the substantial question is concerned the whole difficulty has arisen out of the surmise of counsel that in certain supposed cases the mortgagees might raise objections. As far as we can see Fairclough stands in the position of beneficial owner of the property, subject to an incumbrance for the benefit of the Messrs. Briggs. This suit is brought to restrain the defendant in respect of a covenant which he has broken. First, then, need the Messrs. Briggs have been joined before the Judicature Act, 1873, was passed? I think I can answer with very considerable confidence that they need not have been joined, and when we look at the principle upon which a Court of

Equity acts, that rule is perfect and reasonable. If they need not be joined as plaintiffs, it is clear it cannot be necessary to join them as defendants, for no remedy is sought or can be obtained against them. If they had interfered and suggested that the value of their security would be diminished, whether they ought to be made defendants or not, is a point we need not discuss. I cannot help thinking it is a very doubtful matter. The plaintiff might say, "All I want is a remedy against the wrong-doer; if he is not a wrong-doer, because he is acting under the directions of the mortgagees, let him set that up as a defence." But I am quite sure that Order XVI., Rule 13, would justify us in making an order against the defendant alone which should bind him. I see no reason for making Messrs. Briggs, the mortgagees, defendants, and if there had been any doubt, the rule I have just mentioned would have obviated the necessity of doing so. I think, therefore, that this proceeding was rightly taken by the plaintiff as sole plaintiff against the defendant as sole defendant.

I will add one word as to s. 25, sub-s. 5 of the Judicature Act, 1873. I do not think that sub-section has any application to this case, it only applies to cases where the mortgagor could not, either in his own name or in conjunction with the mortgagee, have brought an action. And I may further observe that if by that sub-section the mortgagor may sue for possession or rents and profits or in respect of trespass or other wrong, meaning wrong independent of any contract or duty, it is possible that the mortgagor may sue for rents and profits, but not for breach of covenant to insure against fire or to repair. I do not think this can have been meant, and perhaps hereafter that consideration may induce the Court, when the question is properly raised, to put some other construction on the word "wrong."

I think that this action was rightly brought by the sole plaintiff against the sole defendant, and therefore the case must go down again to be dealt with further (1); or if the learned judge declines to deal further with it, it must come back to us and we must do the best we can with it.

(1) Manisty, J., having decided that the action was not maintainable through the non-joinder of the mortgagees, other objections, as to the plaintiff's right to sue, were not determined.

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BRETT, J. This is a suit for an injunction to restrain the defendant from using certain premises in a manner inconsistent with the contract of his vendor of which the defendant had notice. It is not disputed that there was an original covenant between Fowler and Steel, nor that the defendant has his estate by devolution from Steel. But, as I understand, it is argued in the first place, that the plaintiff has no interest in this matter, because he is not the equitable owner by devolution from Fowler, who has conveyed to the Messrs. Briggs, and that they, both at law and in equity, are the true owners of the property. The objection then would go this length, not merely that the mortgagees ought to have been joined, but that the plaintiff is not entitled to institute these proceedings. It seems to me that this contention cannot be maintained. Fowler was the owner of a certain interest in the property. A contract was made between Fowler and the plaintiff, of which the intention was to sell the property to the plaintiff, and a price was fixed between them. It is not denied that the contract was between them; but it is objected that at the request of the plaintiff, who had to borrow money to complete the purchase, the conveyance was made direct to Messrs. Briggs. But in that conveyance there is a recital of the loan, and a right given to the plaintiff, on payment of the money to Messrs. Briggs, to come into possession as if the conveyance had been made to the plaintiff himself. Whatever may have been the form of the deed, the contract being clear, and the right to redeem clear, in equity the plaintiff is equitable owner of Fowler's interest by devolution from Fowler; and has merely mortgaged that interest. The plaintiff, therefore, is the representative of Fowler's interest, and the defendant of the interest of Steel. If therefore there was no mortgage, on the principle established by *Tulk* v. *Moxhay* (1), the defendant is rightly made the defendant, and the plaintiff would be entitled to the relief he asks. But it is said, that because of the mortgage Messrs. Briggs ought to be made parties: but we have the highest possible authority for saying, that by the practice of the Court of Chancery the mortgagee in such cases need not be joined. It has further been argued that as a matter of principle, there is no reason why he should; a position much fortified by the rule of Chancery

(1) 2 Phil. 774.

practice. It seems to me that the point has been fairly made out; and it rests upon a most important doctrine; namely, that when a mortgagee has not taken possession, and has done nothing, but has left the property in the hands of the mortgagor, the mortgagor has a right as long as the mortgagee remains inactive, to put in force all the rights of property existing between himself as equitable owner and the occupier, without reference to the mortgagee. So long as the mortgagee does not interfere, the mortgagor, in attempting to put in force such a right as this between the owner and the occupier, may do so without reference to the mortgagee. In that case the mortgagee need not be made a party. But even if that doctrine is wrong, the utmost that can be said is that the mortgagee ought to be a party as well as the mortgagor. It is not the case of a wrong party having sued, but of a right party requiring that another should be joined with him. But that is not a ground on which the suit should be dismissed; the utmost that should have been done was to delay the trial that the mortgagees might be made parties. Whether they should be made parties by their own application, or under Order XVI., Rule 13, is immaterial; the judgment must be wrong if the objection taken was want of parties. Therefore if we deal with the case as if sub-s. 5 of sect. 25, was not applicable, the plaintiff has a right to sue alone; or at most Manisty, J., should have ordered the mortgagees to be joined.

With regard to sub-s. 5 of sect. 25, that is not an enactment to prevent parties from suing who could have sued alone before the Act—it is an enabling not a disabling section. Therefore, on all points, the judgment of Manisty, J., cannot be supported; and the case must go back to him for the consideration of the other matters in question.

COTTON, L.J. In this case, Manisty, J., decided in favour of the defendant, on the ground that in his opinion the plaintiff had not sufficient interest to bring the action, that is, not that others ought to be joined as plaintiffs, but that the plaintiff had no interest in the property. Is that a correct view? It is urged that the mortgagees are not plaintiffs, and the plaintiff as mortgagor has no interest in the estate, but that argument in my opinion

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cannot prevail. We are here to recognise equities, and to deal with substance rather than form. It is not the mortgagees who are the owners, but the mortgagor. The mortgagor is the beneficial owner, subject to the incumbrance, and the plaintiff is in the position of a mortgagor having the beneficial ownership of a rent issuing out of the land and certain other benefits. This suit is not brought to enforce a covenant, but on the ground that the defendant, having purchased land with notice of restrictions as to its use, is not in a position to use it in violation of those restrictions; and any one entitled to have the benefit of the restricting covenants, may come to a Court of Equity to restrain the defendant, not on the ground that he is breaking a covenant which runs with the land, but on the ground that he is dealing with the land inequitably. And the plaintiff has an interest in the performance of the covenant. That disposes of the first ground of objection. In my opinion, whether the mortgagees ought to have been joined or not, the plaintiff had sufficient interest to bring this action. Ought he then to have joined the mortgagees? If he ought, judgment ought not to have been given for the defendant, but the judge ought to have directed, under Order XVI., Rule 13 or 17, that the mortgagees should be served with notice or joined as defendants. These rules especially provide for the joinder of parties, Rule 17, where it appears to the Court that the question ought to be determined with reference to some third person, and Rule 13 where necessary parties have not been joined. In these cases the judge may order the necessary parties to be added; but he should not give judgment for the defendant. Let us now consider the two grounds upon which it has been said that the mortgagees ought to have been joined. First, it is said that all parties interested ought to be joined. But in suits of this character it is not necessary that all parties interested should be before the Court. This is decided by the case of *Western* v. *MacDermott* (1). Any one of the parties interested may sue. Then is it necessary, having regard to the interest of the mortgagee? The exact relation of mortgagor and mortgagee, when the mortgagee is not in possession, is not very clearly defined. But it is sufficient to say that if the mortgagee does not assert his right to

(1) Law Rep. 2 Ch. 72.

possession, and the mortgagor is left to manage the property, he has a right to insist, without reference to the mortgagee, on the observance of any obligations, the non-observance of which would injuriously affect the premises. The mortgagee can come in if he likes. If to restrain the act of which the plaintiff complains would have damaged the mortgagees' security, or even if there was any substantial question of that kind, the Court might have said, "we cannot decide without hearing the mortgagees; make them parties and give them an opportunity of stating their views." But in this case all this is the merest surmise. In a case of this sort, unless there is a probability that the relief for which the plaintiff the mortgagor sues will injuriously affect the interest of his mortgagee, the mortgagee ought not to be brought before the Court on a mere suggestion of a possibility that he may be prejudiced. Therefore, I am of opinion that in the present case the mortgagees need not be brought before the Court. The learned judge was wrong in saying the plaintiff had no interest, and the case ought to go back, in order that the remaining points may be dealt with.

Judgment reversed.

Solicitors for plaintiff: *J. Scott & Clark.*

Solicitors for defendant: *Belfrage & Middleton, for W. M. Skinner, Sunderland.*

[IN THE COURT OF APPEAL.]

Dec. 20.

GARDNER AND ANOTHER *v.* IRVIN AND ANOTHER.

Practice—Discovery of Documents—Documents protected from production by reason of Privilege—Privilege—Affidavit as to Documents, sufficiency of—Rules of Supreme Court, Order XXXI., rule 13.

An affidavit as to documents by a party who objects to produce them is insufficient, if it merely states "that the documents are privileged;" it ought to state and verify the facts upon which the objection is grounded.

CLAIM: That certain boxwood timber was lying in six warehouses at Poti, a port in the Black Sea, in the empire of Russia; the timber was the property of the plaintiffs, and they were entitled to the possession of it; the timber had been bought from

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Messrs. D'Isidare & Salonikidi, and had been delivered to the plaintiffs, and the plaintiffs had paid for the same; whilst the timber was in the warehouses, certain disputes arose between the plaintiffs, as purchasers, and D'Isidare & Salonikidi, as vendors, of the timber, and the plaintiffs took legal proceedings against the vendors in the courts in the empire of Russia. In the course of the legal proceedings an order was made that the timber should be arrested and sequestered for the due performance of any judgment which might afterwards be given in the proceedings. In 1872, one Vonticiano, as agent of the defendants, made a claim to the possession of the boxwood, and after the making of the order arresting the same, Vonticiano, as agent of the defendants, took legal proceedings against the plaintiffs to enforce his rights and those of the defendants to the timber; D'Isidare & Salonikidi were, according to the law of Russia, made parties to the proceedings. The court, being the High Court of Justice of Tiflis, decided by its judgment, dated the 19th of July, 1877, that the boxwood in four of the warehouses was the property of the plaintiffs; and the judgment was and is valid, final, and conclusive according to the law of Russia, not only between the plaintiffs and Vonticiano, but also between the plaintiffs and the defendants, as domini litis of the proceedings, and the defendants were and are liable to pay the costs to the plaintiffs under the judgment.

Defence: a denial of all the material allegations in the statement of claim.

An order having been made at the instance of the plaintiffs for discovery, the defendants made an affidavit stating that they were in possession of certain documents relating to the matters in question in the action set forth in the 1st and 2nd parts of a schedule annexed to the affidavit, and that they objected to produce the documents in the second part of the schedule; and the affidavit further stated "that one reason for objecting to produce the said documents set forth in the second part of the schedule is that the same are privileged." The documents in the second part of the schedule were: "correspondence between ourselves and our solicitors; correspondence between our solicitors and their agents; cash-books, ledgers, and accounts; writ of summons, statement of claim and other pleadings, counsel's opinions, statement of case

in Russian courts prepared by attorney for Vonticiano, including copies of depositions and evidence given."

On the 2nd of November, 1878, a summons was served on the defendants for a further and better affidavit of documents; it was heard on the 6th of November, before Lush, J., who made no order; an appeal from the decision of the learned judge was then made to the Divisional Court. On the 13th of November, after argument, the appeal was dismissed.

The plaintiffs appealed.

Crompton, for the plaintiffs. The affidavit made by the defendants is insufficient; it states merely that the documents are privileged, and yet it is clear from the documents set out in the schedule that some of them, the cash-book, ledger, and accounts, primâ facie, are not privileged. The defendants in their affidavit ought to set out the facts and claim the privilege. The Court could then see whether on the facts the defendants were justified in claiming privilege. With regard to the correspondence, the plaintiffs are entitled to have the dates and addresses of the letters, in order to judge whether they were confidential communications between the defendants and their solicitors in their character of solicitors, and whether it was with reference to this litigation. The plaintiffs are entitled to have from the defendants a better affidavit, setting forth the grounds on which the privilege is claimed: *Minet* v. *Morgan*. (1)

[BRAMWELL, L.J. Order XXXI., rule 13, with Appendix B, Form 9 (2), do not appear to have been brought to the attention of the Divisional Court. Paragraph 3 of Form 9 states "here state upon what grounds the objection is made, and verify the facts as far as may be;" that has not been done.]

(1) Law Rep. 8 Ch. 361.

(2) Order XXXI., rule 13: The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made [that is, for producing documents] shall specify which, if any, of the documents therein mentioned he objects to produce, and it may be in the Form No. 9 in Appendix B. thereto with such variations as circumstances may require.

Appendix B, Form 9: Form of affidavit as to documents. 2. I object to produce the said documents set forth in the 1st and 2nd schedule hereto. 3. That [here state upon what ground the objection is made, and verify the facts as far as may be.]

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FitzAdam, for the defendants. The affidavit as to the correspondence is sufficient. The statement that the correspondence was between the defendants and their solicitors is in itself a sufficient statement of a fact to support the claim of privilege.

[COTTON, L.J. The affidavit ought at least to state how many letters there are.

BRAMWELL, L.J. The affidavit does not state the grounds on which the cash-book and ledger are privileged.]

That does not in any way prejudice the plaintiffs; they can take out a summons for inspection, and upon that application the matter would be discussed and an order made. According to *Minet* v. *Morgan* (1), which was approved of in *Corporation of Hastings* v. *Ivall* (2), this affidavit is sufficient. The form, No. 9, contained in the appendix, is merely a skeleton form, and has been substantially complied with.

Crompton, in reply.

BRAMWELL, L.J. I think that this appeal should be allowed. We are not differing from the Court below, for it would appear that the rule and the form given in the appendix were not brought to the attention of the learned judge or of the Court. It is only necessary, in deciding this case, to read the rule to see if there has been a compliance with it. Clearly there has not. The affidavit does not satisfy the requirement of rule 13, Order XXXI. As it is the plaintiffs' fault that the order and rule were not brought to the attention of my Brother Lush and the Court below, these costs must be costs in the cause.

BRETT, L.J. I think that rule 13 of Order XXXI. has not been complied with. The counsel for the defendants argue that the form given in the Act is only a skeleton form which has been filled up in the affidavit. I think that the skeleton still remains a skeleton, and the affidavit is insufficient. The defendants ought to verify on oath the facts on which they claim the privilege; that is wholly omitted, and the affidavit is clearly insufficient by reason of the omission.

COTTON, L.J. I am of opinion that the appeal must succeed,

(1) Law Rep. 8 Ch. 361. (2) Law Rep. 8 Ch. 1017.

and that a better and further affidavit should be made. It is said that the question might be raised on an application for the inspection of documents, as the present affidavit sufficiently identifies the documents, and that afterwards a further and better affidavit might be made; but the plaintiffs are entitled to make this application. This affidavit does not follow rule 13 of Order XXXI. and the form given in the appendix, and the plaintiffs have a right to call upon the defendants to file a better affidavit. How can it be said that this affidavit is sufficient; in the body of the affidavit the defendants simply say "that the same are privileged," and in the schedule they set out the documents, some of which clearly are not privileged. They ought to say not only that the documents are privileged, which is a statement of law, but they ought to set out the facts from which we can see that the defendants' view of the law is right. Cash-books and ledgers primâ facie are not privileged.

An affidavit in answer to an application for discovery must be construed strictly, because the other side cannot adduce evidence to contradict it. The person seeking discovery is bound by the affidavit made by his opponent, and therefore it ought to be full. It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor, the letters must be professional communications of a confidential character for the purpose of getting legal advice. I think that the plaintiffs are not entitled to have the dates of the letters and such other particulars of the correspondence as may enable them to discover indirectly the contents of the letters, and thus to cause the defendants to furnish evidence against themselves in this action. The law was very recently correctly laid down on this point in this Court. (1)

This affidavit is insufficient, and the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Crowder, Anstie, & Vizard, for Yates, Son, & Stananought, Liverpool.*

Solicitors for defendants: *Gregory, Rowcliffes, & Rawle, for Charnley & Finch, Preston.*

(1) *Taylor* v. *Batten*, 4 Q. B. D. 85.

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Dec. 4.

IN THE MATTER OF THE TRUSTS OF THE WILL OF THOMAS DUTTON, AND OF THE PETITION OF JOHN NASH PEAKE AND ANOTHER.

Will—Perpetuity—Gift to Building Fund of Mechanics Institution—Literary and Scientific Institutions Act, 1854 (17 & 18 *Vict. c.* 112), *ss.* 30, 33.

An Athenæum and Mechanics Institution was established and kept on foot by the subscriptions of certain inhabitants of Tunstall, for the purpose of providing a lending and reference library and a reading room for the use of members. By one of the rules all the property of the institution was vested in the trustees for the time being; and by another rule the society was not to be dissolved unless by resolution of nine-tenths of the members present at a specially convened general meeting, confirmed by a similar resolution at a second meeting. A sinking fund had been established to pay off a mortgage debt on the building occupied, which was the property of the institution. A bequest was made of a sum of money to the trustees for the time being of the institution, to be applied towards "the building fund in connection therewith":—

Held, that the bequest was void as tending to a perpetuity.

THIS was an appeal from a judgment of the county court of Staffordshire, holden at Burslem and Tunstall.

Thomas Dutton by his will dated the 10th of August, 1874, after directing the payment of certain legacies, devised and bequeathed the remainder of his personal estate, and all his real estate, to his wife and Allen Beckett Lownds, the executors and trustees of his will, upon trust, to get in and convert the same into money, and invest the proceeds and pay the annual income to his wife for her life, and from and immediately after her death the testator gave and bequeathed the capital, as well as income of such proceeds and investments, "unto the trustees for the time being of the Tunstall Athenæum Mechanics Institution, to be applied by them towards the building fund in connection therewith."

The testator died and his will was proved by the executors named therein. The testator possessed no real property. On the death of the wife, the surviving executor, under the Trustee Relief Acts and the County Court Act, 1867, paid the fund, amounting to 431*l.* 2*s.* 2*d.*, into the Post Office Savings Bank to abide the order of the county court.

The trustees of the Tunstall Athenæum and Mechanics Institution petitioned that the money should be paid to them as such

trustees, to be applied by them as directed by the will. The case came on for hearing, and the next of kin of the testator, the executor, and the trustees of the institution, were represented. It appeared by the evidence that the institution was founded for the purpose of supplying a library, consisting of a library of reference and a circulating library, and a reading room, and for holding public lectures and classes for mutual improvement. The institution occupied a house purchased by the committee. There was no "building fund," but there was a "sinking fund," formed by resolution of the committee, for the purpose of paying off a mortgage debt on the premises. The rules relating to the constitution of the society, so far as material to the question in this case, were as follows:

1. "The members of this institution shall consist of

(*a*) "Donors of 10*l.* or upwards in money or books at one time, who shall be invested with all the privileges of class *b* for life.

(*b*) "Honorary subscribers of 1*l.* and upwards annually, who shall be eligible to any office, and entitled to all the privileges of the institution.

(*c*) "Subscribers of 10*s.* per annum, with 1*s.* entrance fee, who shall be entitled to all privileges as above.

(*d*) "Subscribers of 5*s.* per annum, and 6*d.* entrance fee, entitling them to the use of the reading room or library separately, as may be determined upon at the time of entering.

4. "The institution shall not be dissolved without the consent of nine-tenths in number of the members present at a general meeting to be specially called for that purpose, such consent to be confirmed by the like majority at a further special general meeting, to be called within not less than one or more than three calendar months from the passing of such first resolution.

5. "The property and effects of the institution shall from time to time be vested in the trustees for the time being in trust for the general benefit of the members.

45. "No member, on withdrawing from this institution by forfeiture, expulsion, or otherwise, shall be entitled to claim any share or interest in the property of the institution."

By the judgment of the county court the gift to the trustees of

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the institution was declared void under 9 Geo. 2, c. 36, on the ground that it was a bequest of money to be laid out in land for a charitable purpose, and it was directed that the property should go amongst the next of kin.

A rule was obtained, calling on the executors and the next of kin to shew cause why the judgment or order of the judge of the county court should not be set aside, and an order made in the terms of the petition on the ground that the institution was not a charity, and that the gift was not void for perpetuity, or on the ground that if the institution was a charity the gift was not void under 9 Geo. 2, c. 36.

May 10, 1878. *A. Charles, Q.C.*, for some of the next of kin. The question is whether the gift is void, either as a gift to a charity of money to be expended in land or as tending to create a perpetuity. As to the first point there is no direction given in the will that land is not to be purchased. On the other point, although the 4th rule contains a power to dissolve the society, it is clearly contemplated that the society is to continue. The case is not distinguishable from *Carne* v. *Long*. (1) [He was then stopped.]

English Harrison appeared for others of the next of kin.

J. Robins, for the executor.

A. D. Tyssen, and *Sidney Woolf*, for the trustees of the institution. This is a gift in such a mode as to make the subject of it part of the property of the society, and such a gift is good; *Cocks* v. *Manners* (2); *Stewart* v. *Green*. (3) The society, if it were dissolved, might divide the property among the then members, as in *Brown* v. *Dale* (4). In *Carne* v. *Long* (1) the gift was to the trustees, and their heirs for ever, on trust in effect to apply the rents each year for the benefit of the institution, and the members had no power to sell the land. In *Cocks* v. *Manners* (2) Vice-Chancellor Wickens distinguished *Carne* v. *Long* (1) on this ground.

A. Charles, Q.C., in reply. This is an institution to which 17 & 18 Vict. c. 112 by s. 33 applies, and by s. 30 of that Act, upon a

(1) 2 D. F. & J. 75; 29 L. J. (Ch.) 503.
(2) Law Rep. 12 Eq. 574.
(3) 5 Ir. Eq. 470.
(4) 9 Ch. D. 78.

dissolution, the members would receive no profit, but the fund would go to some other institution, determined as there pointed out.

Cur. adv. vult.

Dec. 4, 1878. KELLY, C.B. This is an appeal from the judgment of the county court, and the question is whether, under the will of one Thomas Dutton, the trustee and executor of whose estate paid money into the Post Office Savings Bank under the Trustee Relief Acts, a bequest, to the trustees for the time being of the Tunstall Athenæum and Mechanics Institution, can be supported. The first point raised is whether this was to be treated as a gift or bequest to a charitable institution, and independently of that there is another question, whether the gift was void for perpetuity. The terms of the bequest are to the trustees for the time being of the Tunstall Athenæum Mechanics Institution, to be applied by them towards the building fund in connection therewith. If this institution is a charity this bequest would probably be held void under the Mortmain Acts. When, however, we look to the rules which set out at great length the objects of the institution, we find that it is in reality a species of club in which a number of persons come together for literary purposes and mutual improvement. Under these circumstances the case of *In re Clark's Trusts* (1) is applicable, where Vice-Chancellor Hall deals with this question and decides that an institution for mutual benefit is not a charity.

The principal question, however, argued before us was whether the bequest was a valid one or whether it was void on the ground that, looking at the express terms of the bequest, it tended to a perpetuity. I am of opinion that it is void on this ground. In the case of *Carne* v. *Long* (2) the devise was of freeholds to "the trustees for the time being of the Penzance Public Library to hold to them and their successors for ever, for the use, benefit, maintenance, and support of the said library." Those are certainly stronger words than appear in this bequest, but looking to the rules and constitution of this society, it appears to me that it need not come to an end, so that though this bequest does not

(1) 1 Ch. D. 497. (2) 2 D. F. & J. 75; 29 L. J. (Ch.) 503.

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contain the strong words of that in *Carne* v. *Long* (1) the principle of that case must apply. The Lord Chancellor in his judgment, said, "If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided that the society is not to be broken up so long as ten members remain. The devise therefore, is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property comprised in the devise is therefore to be taken out of commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but so long as ten of the members of the society shall remain." On that ground the decision of the Vice-Chancellor was reversed. There are several cases, among others *Thomson* v. *Shakespear* (2), which go to shew that where by the constitution of the society there is nothing necessarily to put an end to its existence, so that it may last an indefinite time, and the gift is in such terms as to make the subject of it an accession to the capital or permanent property of the society, and not a sum to be brought into the annual accounts as part of the year's income to be disposed of by the then members, then there is a tendency to a perpetuity and the bequest is void. For these reasons, I think the next of kin are entitled to the judgment of the Court, and the appeal must, therefore be dismissed.

HUDDLESTON, B. I am of the same opinion. I think this is clearly not a gift to a charity, but that the bequest is void on the ground that by it the testator was aiming at creating a perpetuity. We were referred to the rules of the institution, and it was said there was nothing to prevent the dissolution of the society and the division of the property, so that the case would resemble that of *Cocks* v. *Manners* (3), where there was a bequest to a voluntary

(1) 2 D. F. & J. 75; 29 L. J. (Ch.) 503.
(2) 1 D. F. & J. 399; 29 L. J. (Ch.) 276. (3) Law Rep. 12 Eq. 574.

association of ladies for pious and charitable purposes. This argument, however, if well founded, was met by the contention that under the Literary and Scientific Institution Act, 17 & 18 Vict. c. 112, s. 30, that could not be done. That Act seems to shew that the money could not be appropriated among the members. On the whole, I am of opinion that this bequest does tend to a perpetuity and is void.

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RE DUTTON.

Rule discharged. (1)

Solicitors for petitioners: *Llewellyn, Ackrill, & Hammack, for Llewellyn & Ackrill, Tunstall.*

Solicitor for next of kin: *H. Tyrrell.*

Solicitors for trustee: *Norris, Allens, & Carter, for G. Smith, Tunstall.*

WOODGATE *v.* GODFREY.

1879

Feb. 17.

Bill of Sale—Inventory of Goods with Receipt attached—Receipt of Sheriff's Officer for Purchase-money of Goods sold under Execution—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.

A judgment debtor's household furniture having been seized at his house under a fi. fa., the debtor's father-in-law bought them from the sheriff's officer, and took his receipt for the purchase-money. The receipt contained an inventory of the furniture. On the same day the purchaser let the house and furniture to the debtor at a rent under a written agreement, and the debtor continued in possession of the house and furniture:—

Held, that the receipt did not require registration as a bill of sale under 17 & 18 Vict. c. 36, ss. 1, 7; since the sale was by the sheriff's officer and an absolute one, and the receipt was not the medium of transfer but only evidence of payment.

THIS was an interpleader issue tried before Pollock, B., in which the plaintiff affirmed and the defendant denied that certain household furniture seized by the sheriff of Surrey in 1878, under a writ of fi. fa, in execution of a judgment recovered by the defendant Godfrey against C. D. Watson, were the property of Woodgate as against Godfrey. Woodgate, who was the father-in-law of Watson the judgment debtor, claimed the goods under a purchase from the sheriff's officer in 1875. It appeared that the sheriff's officer having in 1875 seized the goods in question under a fi. fa., issued on a judgment obtained against C. D. Watson by one

(1) Leave to appeal was refused.

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Wood, sold them to Woodgate for 589*l.* 17*s.*, and gave him a receipt in the following terms:—

"In the Common Pleas. "51, Stamford Street,
"Blackfriars Road.
"31st May, 1875.

"Robert Wood . . . Plaintiff;
"Charles Dillon Watson . Defendant.

"Received of Mr. Thomas William Woodgate, of the Boundaries, Balham, Surrey, the sum of five hundred and eighty-nine pounds, seventeen shillings, being the value of the undermentioned goods, chattels, and effects, seized by the sheriff of Surrey in the above action, at 15, Altenburg Gardens, Lavender Hill, Battersea, in the county of Surrey, and sold to the said Thomas William Woodgate.

"£589 17*s.* (Signed) "H. Herrick & Son."

The receipt contained an inventory of the goods.

At the same time, Woodgate, by a written agreement bearing date the 31st of May, 1875, let the house, 15, Altenburg Gardens, together with the goods in question to Watson, on a quarterly tenancy at a rent of 112*l.* a year, and Watson continued in possession as before. Pollock, B., directed the jury that the receipt was not a bill of sale under the Bills of Sale Act, and did not require registration, and the jury found a verdict for the plaintiff Woodgate.

R. V. Williams, for the defendant, moved for a rule nisi for a new trial on the ground of misdirection. Sales by the sheriff's officer are clearly within the contemplation of the Bills of Sales Act, 17 & 18 Vict. c. 36, as shewn by the words of s. 1, "Or in case the same shall be made or given by any person under or in execution of any process, then a description of the residence or occupation of the person against whom such process shall have issued." The interpretation clause, s. 7, in defining bills of sale uses words large enough to include a receipt. (1) The saving

(1) Sect. 7: "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels . . . . but shall not include the following documents, that is to say . . . . transfers of goods in the ordinary course of business of any trade or calling. . . ."

words in that section as to mercantile transactions prevent the application of the Act to the case of an ordinary sale in the way of business. The mischief aimed at by the Act was what happened in the present case, a sale by a debtor with an agreement that he shall remain in possession as the ostensible owner. If such a case is not within the Act a debtor need only get a friend to obtain judgment against him, buy the goods from the sheriff and let them again to the debtor. Such a receipt as the present was held to be "an assurance" within the Act by the Court of Appeal in *Ex parte Cooper In re Baum.* (1)

[COCKBURN, C.J. There the sale was by the debtor himself, and there was no sheriff's officer in the case.]

That makes no difference in respect of the mischief aimed at by the Act. In *Ex parte Odell In re Walden* (2), a similar receipt and an agreement executed at the same time to let the debtor remain in possession for a sum of money were held to be within the Act. Those cases have overruled or thrown doubt on *Allsopp* v. *Day.* (3) The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4, expressly includes "inventories of goods with receipt thereto attached, or receipt for purchase-moneys of goods and other assurances of personal chattels."

COCKBURN, C.J. I think there ought to be no rule. The argument if pushed to its logical conclusion comes to this, that in every instance of a sale out and out of goods where a receipt is given it is a bill of sale which must be registered under the Act. If we decided in accordance with that contention it would introduce into almost the whole range of commercial transactions a statutory enactment of a very onerous character. The Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1—and that is the only Act with which we have to do in the present case—enacts that "every bill of sale of personal chattels made . . . . either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power either with or without notice, and either immediately after the making of such bill of sale, or at any future time to seize or take possession of any property and effects com-

(1) 10 Ch. D. 313. (2) 10 Ch. D. 76.
(3) 7 H & N. 457.

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prised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to" shall be registered. That was to prevent the mischief which arises when a person, selling goods so as to pass the property in them but without the possession, retains the possession himself, and thereby deceives the world into supposing he is the owner, while in reality he has given the purchaser the right to seize them at any time. But that Act was not intended to apply to a case of an out and out sale by a sheriff's officer where the possession remains in the execution debtor. Sect. 7 of the Act on which reliance is placed has nothing to do with such a case, but applies to cases where the sale is not out and out. To hold that every sale of goods which is evidenced by a receipt must be registered would introduce an intolerable burden. The present was not a transaction where the sheriff had anything to do with the ulterior destination of the goods. If there had been any instrument shewing that the sheriff was a party to any fraudulent arrangement it might be different, but the sheriff merely sells in execution of his duty and gives a receipt. The receipt is not the medium of transfer. The sale would be just as good without a receipt. All that the sheriff gives it for is to furnish evidence of the payment. The receipt does not pass the property in the goods. I think therefore it is not within the Act. A contrary decision would be a very great hardship on purchasers, and would entail most mischievous consequences.

POLLOCK, B. I think there should be no rule. This was a sale out and out of goods so far as the sheriff was concerned. It is said the case ought to be within the statute because the goods were allowed to remain in the possession of the debtor. But that cannot alter the circumstances of the sale. The two cases relied on are distinguishable. In *Ex parte Odell* (1) the agreement and the receipt amounted together to a mortgage. In *Ex parte Cooper* (2) the receipt was given not by the sheriff but by the debtor himself.

Rule refused. (3)

Solicitor for defendant: *J. Wilson Heritage.*

(1) 10 Ch. D. 76.
(2) 10 Ch. D. 313.
(3) A rule nisi was subsequently granted by the Court of Appeal.

EX PARTE TERRAZ.

1878
Dec. 2, 3.

Extradition—Warrant—Sufficiency of Description of Offence—"Crimes against Bankruptcy Law"—Extradition Acts, 1870 (33 & 34 *Vict. c.* 52), *s.* 8, *and Schedule, and* 1873 (36 & 37 *Vict. c.* 60), *s.* 1, *and Schedule.*

By the Extradition Acts, 1870 and 1873, indictable offences under the laws for the time being in force in relation to bankruptcy may be made the subject of extradition treaties. By such a treaty, among other crimes for which extradition was to be granted, were "crimes against bankruptcy law." A warrant for the apprehension of a fugitive criminal by virtue of such treaty described the offence as "the commission of crimes against bankruptcy law" within the jurisdiction of the foreign power demanding the extradition:—

Held, that the description was sufficient, and that the warrant was good.

THIS was a rule for a writ of habeas corpus, directed to the keeper of the Middlesex House of Detention, to bring up the body of one Alexander Terraz with a view to his discharge from custody.

It appeared that on the 12th of November, 1878, a warrant was issued by the chief magistrate at the Bow Street Police Court on the sworn information of the chancellor of the Swiss consulate-general in London. The warrant stated that it had been shewn to the magistrate that Alexandre Terraz, late of Locle, was accused of "the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation," and directed that he should be apprehended and brought up to be further dealt with according to law.

The prisoner was apprehended on the 18th of November, and taken before the magistrate and remanded. While he was under remand, a rule nisi was obtained on his behalf calling on the Solicitor of the Treasury, and the keeper of the Middlesex House of Detention, to shew cause why a writ of habeas corpus should not issue to bring the prisoner before the Court, on the ground that the warrant did not sufficiently set forth the nature of the offence, and otherwise was not good.

Before the case was argued, the Home Secretary issued his order to the magistrate under the Extradition Act, 1870, s. 7, requiring him to issue a warrant to apprehend the prisoner for the crime of fraudulent bankruptcy. A second warrant was

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accordingly issued stating the offence of the accused to be "the commission of crimes by a bankrupt against bankruptcy laws, that is to say, for that he, having been adjudicated a bankrupt, unlawfully did not deliver up to the trustee administering his estate for the benefit of his creditors, or as he directed, all such part of his real and personal property as was in his custody or under his control and which he was required by law to deliver up within the jurisdiction of the Swiss Confederation."

The Extradition Act, 1870, enacts by s. 7, "A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal. If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody."

By s. 8, "A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—

"1. By a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and

"2. By a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint, and such evidence, or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction."

Among the crimes enumerated in the schedule to this Act are "crimes by bankrupts against bankruptcy law."

By s. 1 of the Extradition Act, 1873, the former Act is to be

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construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to the second Act, and among these is the following: "Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act." In the year 1874 an extradition treaty was concluded between her Majesty and the Swiss Confederation, and among the crimes for which extradition was to be granted were: "Crimes against bankruptcy law."

Dec. 2. *Sir J. Holker*, *A.G.*, and *C. Bowen*, for the Crown; and *H. D. Greene*, for the Swiss Government, shewed cause. The purpose of issuing the warrant is to apprehend the prisoner with a view to the investigation of the charge against him. For this purpose the particularity of a warrant of commitment is not necessary, but a general description is sufficient: at all events, this warrant uses the very words of the treaty.

Jervis's Act (11 & 12 Vict. c. 42), ss. 9, 10, provides that no objection shall be taken or allowed to the warrants of justices therein mentioned for any alleged defect therein in substance or form; but apart from that Act the prisoner is in custody under this warrant, and the Court will not discharge him: *Ex parte Scott* (1); *In re Tivnan* (2); Hale's Pleas of the Crown, vol. ii. p. 110; *Rex* v. *Marks* (3); *Ex parte Krans.* (4) [They then contended that even if the first warrant was insufficient, there was good ground for detaining the prisoner on the second warrant, and referred on this part of the case to *Re Tivnan* (2); *Re Charles Smith* (5); *Ex parte Cross* (6); *Ex parte Dauncey* (7); *Re Bull* (8); *Ex parte Phipps.* (9)]

Atherley Jones, contrà. Assuming Jervis's Act to apply, this warrant does not comply with the provision that it "should state shortly the offence on which it is founded." Here there is no offence disclosed, "crimes against the bankruptcy law" being only a general description of a class of offences, and not a description of

(1) 9 B. & C. 446.
(2) 5 B. & S. 645.
(3) 3 East, 157.
(4) 1 B. & C. 258.
(5) 3 H. & N. 227.
(6) 2 H. & N. 354; 26 L. J. (M.C.) 201.
(7) 8 Jur. 829.
(8) 15 L. J. (Q.B.) 235.
(9) 11 W. R. 730.

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a specific offence known to the law of England. The warrant must state the offence specifically, otherwise "it cannot appear whether it be within the jurisdiction of the justices, nor can it appear whether the party be bailable or not:" Hale, Pleas of the Crown, vol. ii. p. 111, citing 2 Co. Inst. pp. 52, 591: *Caudle* v. *Seymour*. (1) The warrant shews no crime, and is like a blank warrant, which is bad: Chitty, Criminal Law, vol. i. p. 110. [He also contended that the second warrant could not be set up in answer to this rule.] (2)

Cur. adv. vult.

Dec. 3. KELLY, C.B. The question in this case is whether the prisoner, who, under circumstances to which I may briefly allude, has been taken into custody, and in respect of whom an application has been made on behalf of the Swiss Government for his extradition, is lawfully in custody. I do not think it necessary to refer to more than one of the many cases cited, because it appears to me that the whole case turns upon the first warrant, that of the 12th of November, which is mentioned in the rule, to the effect of which I will now proceed to direct attention. It appears that the warrant runs thus: "That Alexandre Terraz, late of Locle, is accused of the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation." The question is whether that description of the offence or offences charged against the prisoner is sufficient within the meaning of the statutes relating to extradition, or whether it is too general in its terms in not specifying any particular offence. I entertain no doubt that it is sufficient, and that the magistrate was entitled on this warrant to remand the prisoner with a view to further inquiry, and the production of the evidence which might lead either to his discharge or to his being delivered to the agent of the Swiss Government. It is perfectly clear that a warrant must sufficiently indicate the crime or crimes alleged to have been committed by the person who is to be apprehended under it. Looking at the Act of 1870, we find in

(1) 1 Q. B. 889; 10 L. J. (M.C.) 130.

(2) The judgment of the Court as to the validity of the first warrant rendered a decision on the points raised as to the second warrant unnecessary.

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the schedule a number of crimes specially enumerated, and they may be divided into two classes—those that can be described and specified in one or two words, and those which cannot be so described, and which it would be impossible to describe with legal certainty without entering into a lengthened definition. Of the first class are murder, manslaughter, forgery, false pretences, and the like. Then follow two descriptions, as to either of which there would be great uncertainty and difficulty in an attempt to express in legal language a complete definition of an offence coming within the words used. The first is "crimes by bankrupts against bankruptcy law;" the other "fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force." Now to define in legal language, and in terms which would amount to a complete description, any offence which might have been committed, and might come within either of these two classes, might be exceedingly difficult; and therefore the legislature seem to have authorized, by using general words, the general description of offences such as that with which the prisoner is charged as "crimes against bankruptcy law." I do not think that we ought to refer to or act upon the second warrant, except by way of illustration, in so far as it probably explains what is the actual charge made against the alleged criminal. From the second warrant it would seem that that charge is the not delivering up to the trustee of his estate the real or personal property which he was required by law to deliver up for the benefit of his creditors. Now to put that charge into legal language might be difficult for those who had occasion at very short notice to obtain a warrant for the apprehension of an alleged criminal, and who would necessarily be required to act with great celerity and promptitude. For this reason it seems to me the legislature has permitted this comprehensive mode of description, so as to enable the complainant to bring the offender by general words of warrant before the magistrate, with a view to determining whether there is evidence to justify his extradition. If there were any doubt in the matter it would, I think, be settled by the case of *Ex parte Krans* (1), which is decisive upon the question of the description

(1) 1 E. & C. 258.

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of the crime in a warrant which justifies, or claims to justify, imprisonment until further inquiry. The marginal note of that case is to this effect, "Where persons detained without any warrant on board one of his Majesty's ships of war on a charge of smuggling, and on suspicion of murder, were brought up on writs of habeas corpus, and it appeared by the return to those writs and to a certiorari which issued at the same time, that the prisoners might be guilty of the offences imputed to them, the Court refused to discharge them out of custody, and committed them to the custody of the marshal, in order that they might be taken before some competent authority to be examined touching the matters contained in the returns, and to be further dealt with according to law." The language of Lord Tenterden is conclusive upon the point that, where in such a case there must be further inquiry which requires the continued imprisonment of the party charged, if a habeas corpus be obtained, he is not to be discharged, but should be remanded for the purpose of the further inquiry before a competent authority, in order that he may either be put upon his trial or discharged, according to the result of the inquiry. Dealing with this case as if the prisoner were before us on a writ of habeas corpus, the result would necessarily be, the warrant not being upon a conviction or judgment, but one merely authorizing apprehension and detention in prison until further inquiry, that he would be remanded in custody for the purpose of such further inquiry.

Huddleston, B. With regard to the first point, I am entirely of the same opinion as my Lord. The question is, whether the warrant discloses a good ground for detaining the prisoner. Now, it is clear that it is a warrant for the safe custody of the party until the case can be properly inquired into. I make that observation because, throughout the current of authorities there is a distinction made between warrants for apprehension, warrants for safe custody, pending the investigation before the proper tribunal, warrants for safe custody where the party is imprisoned for the purposes of state, or for the protection of individuals, and warrants in execution. Warrants in execution are in the nature of convictions, and it has always been held that warrants of that class require considerable strictness, for the reason that when the

party is brought up on the habeas corpus, and is held under a warrant in execution, the Court can only judge by what appears in the warrant whether a crime has been committed, and whether the alleged criminal is properly held in custody. But warrants for apprehension are merely instruments not directed to the prisoner, but directed to the officer for his protection, and to enable him to take the person into custody either for the purpose of inquiry, or of holding him in custody while the inquiry is going on, or of keeping him in safe custody for some of the reasons I have mentioned. Now, doubtless the latter class of warrants, namely where the party is to be held in safe custody during a particular time, would seem to require more particularity than a warrant for apprehension; but there are clear authorities to shew that warrants for safe custody, even for public purposes, or for the protection of the public or individuals, may be in general terms. There is a case which illustrates this probably better than any other; I mean the case of *Rex* v. *Despard*. (1) A power was given by 38 Geo. 3, c. 36, for suspending the Habeas Corpus Act, and it was by that statute enacted that where a person should be imprisoned for high treason, suspicion of treason, or treasonable practices, or by warrant of any of her Majesty's principal secretaries of state for such causes as aforesaid (that is, high treason, suspicion of treason, or treasonable practices), he might be detained in custody until the 1st of February, 1799, that is to say, his right to be tried was to be suspended. In Despard's case, the Secretary of State's warrant committed Colonel Despard to custody under that statute, alleging generally "treasonable practices," and he was brought up on a habeas corpus. Mr. Fergusson who argued for the writ, contended that the Court should not act upon such an indefinite warrant, from which it did not appear whether the charge was for high treason, or petty treason, or suspicion of either, or whether it was for being accessory after the fact, or it might be for publishing a seditious libel, or drinking to the health of a traitor, or asserting the Pope's supremacy, or a variety of other acts. The Attorney General (Sir John Scott), in shewing cause, did not rely upon the Act of Geo. 3, as legalising warrants in any other form than was warranted by the common

(1) 7 T. R. 736.

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law, but upon the fact that the warrant was perfectly good at common law, and he cited and referred to upwards of fifty precedents for warrants of this kind, and pointed out those in particular that were under the reign of William III., Queen Anne, George I., George II., and George III. The importance of that appears from the judgment of the Court, in which they admitted that those were authorities, and pointed out that, if any had been quoted under the reigns of Charles II. or James II., they would not have attached much importance to them; but as these warrants were issued at the time when, as Lord Kenyon observed, "the liberties of the subject were well understood and nobly asserted," and many of them too, as he further said, in the time of Lord Holt, "a man above all praise, and he was assisted by able judges, one of whom was Mr. Justice J. Powell, who fell little short of Lord Holt himself," the Court held them to be authorities shewing that at common law a commitment even for safe custody for political purposes, in contravention of the liberty of the subject, was perfectly good in describing the offence charged generally as "treasonable practices," which were the words used in 38 Geo. 3, c. 36. In the case of *Rex* v. *Gourlay* (1), where a person was held under a commitment very different from and requiring greater strictness than a commitment for investigation merely, a general form was again admitted, and Lord Tenterden, in delivering judgment, said: "It is not a commitment for safe custody, in order that the party may afterwards be brought to trial, nor is it a commitment in execution; but it is a commitment for safe custody in order to secure the party and prevent mischief to his Majesty's subjects. That being the object, I think the warrant ought not to receive the same strict construction as a warrant in execution;" and he concludes his judgment by saying, "Upon the whole, I think that the warrant, not being a warrant of commitment in execution, is sufficiently certain, and that the prisoner must be remanded."

Both these cases are authorities to shew that, even in warrants for safe custody, a general assertion or a general charge is sufficient. Now, the present is a warrant for the apprehension of the party, and issued under the provisions of the Extradition Act,

(1) 7 B. & C. 669.

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EX PARTE TERRAZ.

1870, which mentions "extradition crimes." By the interpretation clause (s. 26), an "extradition crime" is defined to mean "a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to this Act." Amongst those crimes are mentioned, "crimes by bankrupts against bankruptcy law." I concede that, the description in the first warrant being "crimes against bankruptcy law," had the first warrant been framed under the Act of 1870 alone, it would have been insufficient, because that Act only applies to crimes committed by bankrupts against bankruptcy law; but the Extradition Act, 1873, enlarges that description to "any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the Act of 1870." Therefore "crimes by bankrupts against bankruptcy law" must now be read as "crimes against bankruptcy law." That is the general term. What, then, appears in the first warrant? That this man is charged with "crimes against bankruptcy law," and therefore in following the exact words of what must now be considered the amended schedule of the Act of 1870, it is obvious that all that is necessary has been done.

The treaty itself between this country and Switzerland, in 1874, in the 10th article, provides that the requisition for extradition may be made by means of the post or by telegraph. The magistrate receives information that something has been done which is an extradition crime, and he states that in his warrant in the very terms of the information which he has received, and when the matter is brought before him, and he proceeds to an investigation of the whole case, no doubt it must be shewn that he has jurisdiction to deal with the accused on a charge of committing an extradition crime, but no habeas corpus would be granted to discharge the prisoner out of custody while that investigation is pending; and the cases referred to by Mr. Greene of *Rex* v. *Marks* (1), and *Rex* v. *Krans* (2), are authorities confirming that view. Every protection is obviously given by the Extradition Act to persons taken up under its provisions. Everything in the nature of a political crime is expressly excluded, and no man can be apprehended for an extradition crime as a cloak under

(1) 3 East, 157. (2) 1 B. & C. 258.

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which he may be convicted of a political one (s. 3, sub-s. 1). The Act also provides (s. 11), that, upon the magistrate committing the alleged criminal to prison, he shall inform him that he has a right to a habeas corpus, and that the extradition warrant for sending him out of this country to the foreign state will be suspended for fifteen days in order to enable him, if he chooses to do so, to apply for a writ of habeas corpus and have the question decided, when, if it turns out that the crime charged is not within the treaty or the Act, he will be discharged. It is moreover provided by the 3rd section (sub-s. 2) that a fugitive criminal shall not be detained or tried in the foreign state to which he may have been surrendered, for any offence committed prior to his surrender, other than the extradition crime upon which the surrender is grounded, until he has been restored or had an opportunity of returning to her Majesty's dominions. Every possible protection therefore is given to a prisoner under this statute, and when I consider that, when I look to authority, and when I see what the nature of this warrant is, I feel perfectly satisfied that a warrant for apprehension in the general terms of the present one is a perfectly good and valid warrant, and that the prisoner under it cannot be discharged.

Rule discharged.

Solicitor for prisoner: *Merriman.*
Solicitor for Crown: *Solicitor to the Treasury.*
Solicitors for Swiss Government: *Freshfields & Williams.*

GREAVES *v.* KEENE.

1879
Feb. 20.

Gaoler—Discharge of Prisoner in Custody for Contempt—Default by Solicitor in payment of Sum of Money as Officer of Court—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

The Debtors Act, 1869, s. 4, enacts that "no person shall be arrested or imprisoned for making default in payment of a sum of money," except (inter alia) in case of "default by an attorney or solicitor in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order," and provides that "no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year."

In an action in which the present plaintiff acted as solicitor and improperly signed judgment and issued execution and received the amount of the levy, an order was made on him to bring that amount into court, and on his non-compliance an order of attachment was made under which he was arrested and committed to the custody of the defendant. The order was to attach the plaintiff so as to have him before the Common Pleas Division of the High Court of Justice to answer touching an alleged contempt, but the order did not shew what the contempt was. The plaintiff was kept in custody for more than a year, and then applied for and obtained his discharge under a judge's order. In an action by him against the defendant for detaining him beyond the year:—

Held, that whether the Debtors Act, 1869, s. 4, applied or not, the defendant having complied with the order was not liable to an action, but was protected by the exigency of the writ.

Moone v. *Rose* (Law Rep. 4 Q. B. 486), distinguished.

This was an action brought against the Governor of the Surrey County Gaol for wrongfully detaining the plaintiff in custody.

At the trial before Pollock, B., at Westminster at the Michaelmas Sittings, 1878, the learned judge nonsuited the plaintiff on the opening of counsel. The facts, as they appeared by the pleadings or were admitted on the argument, were as follows:—

The plaintiff acted as solicitor for one Ruddock in an action *Ruddock* v. *Lake*, and on the 8th of March, 1876, signed judgment and issued execution. The Sheriff of Middlesex subsequently paid over to the present plaintiff the amount of the levy, namely 100*l*. On the application of the defendant Lake, the judgment so entered was set aside as having been improperly signed, the subsequent proceedings were stayed, and the money so paid by the sheriff was ordered to be brought into court by the plaintiff forthwith. This order was not complied with, and on the 23rd of March of the same year an order was made that a writ of attach-

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ment should issue against the plaintiff for his neglect and refusal to obey the order to pay the money into court. On the 5th of May an order was made that a writ of attachment might issue in the county of Surrey. The order ran thus: "We command you to attach Albert Greaves so as to have him before us in the Common Pleas Division of our High Court of Justice, wheresoever the said Court shall then be, there to answer us as well touching a contempt which he it is alleged hath committed against us, as also all such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf."

The plaintiff was arrested on the 12th of August, 1876, and on the same day committed by the sheriff to the custody of the defendant. He remained in custody for a year, but on the 10th of August, 1877, he gave notice in writing to the defendant that he claimed to be discharged on the following day. The defendant did not act on this notice, and the plaintiff applied to a judge and obtained an order for his discharge, and was accordingly discharged on the 16th of August. The claim in the action was in respect of the detention from the 12th to the 16th of August.

A rule having been obtained to set aside the non-suit,

C. S. Bowen, and *Lyon*, shewed cause. The Debtors Act, 1869, s. 4 (1), forbids imprisonment for debt for more than a year in the case of a solicitor ordered to pay a sum of money in his character as an officer of the court. This does not apply to the case of payment into court, and further the plaintiff was committed for the contempt, and so his case does not come within the section

(1) 32 & 33 Vict. c. 62, s. 4: "With the exception hereinafter mentioned no person shall, after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment. . . . (4) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order. . . . Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money."

at all. But, even if it did, the defendant is protected by the warrant. He has no right to go behind it, while it stands he is bound to obey it and is protected.

Gibbons, and *Pym Yeatman*, for the plaintiff. There can be no difference between the cases of payment to a creditor and payment into court, in either case the order is made on the solicitor as an officer of the court, and is within the fourth exception. The contempt of Court is the non-payment of the money, and the gaoler must read the warrant by the light of the statute: *Moone* v. *Rose*. (1)

KELLY, C.B. I should be glad if the legislature had pronounced how long, in the case of an officer of the court committed for disobedience to an order or other contempt, his imprisonment is to last, but no such law exists. The warrant in this case is in a well-known and usual form, and it must be obeyed by the officer to whom it is directed according to its exigency. Now the warrant commands that the plaintiff should be detained, so that he may be brought before the Common Pleas Division of the High Court of Justice, and until that takes place the prisoner has no claim to be discharged. Independently of this I go perhaps further than my learned Brother did at the trial, or than is perhaps strictly necessary for the decision of this case, for I think that, whether a time for the imprisonment were limited or not, the officer is not bound to inquire what statute is violated. All that he has notice of here is that the plaintiff is committed for contempt, but of what contempt the defendant has no notice, but he is required to keep the person in contempt until directed to bring him before the Common Pleas Division. This he has done, and he is not liable for so doing. Our judgment must be for the defendant.

POLLOCK, B. It seems to me unnecessary to express any opinion on the Debtors Act, 1869. For the decision of this case it is sufficient to say that the defendant, in obedience to his duty under a warrant of the Court, detained the plaintiff. The defendant is not by that warrant ordered to keep the plaintiff for any

(1) Law Rep. 4 Q. B. 486.

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particular time or for any particular offence. The attachment is of a quasi-criminal character, and the only mode in which the defendant can obey it is by keeping the body of the plaintiff until the further order of the Court. Thus it is a different case from that in which the time of detention is expressed in the margin of the warrant, or may be gathered from it as in *Moone* v. *Rose* (1), in which case at the expiration of the time the gaoler ought to discharge his prisoner without further order.

Rule discharged.

Solicitor for plaintiff: *W. F. Morris.*

Solicitor for defendant: *Smallpiece, for Smallpiece & Sons, Guildford.*

Feb. 25.

BOX *v.* JUBB AND ANOTHER.

Water stored—Overflow from Defendants' to Plaintiff's Land—Vis Major.

The defendants possessed a reservoir with sluices connected with a main drain or watercourse, from which the reservoir was supplied, and with sluices by which the surplus water was returned into the drain at a lower level. The combined effect of the emptying of a reservoir belonging to a third person above the defendants' premises, and of an obstruction in the drain below them, was to force water through the sluices into the defendants' reservoir and so cause an overflow thence on to the plaintiff's land. In an action for damage caused thereby it was shewn that the defendants had no control over the main drain, or the other reservoir, or knowledge of the circumstances which caused the overflow, and that the sluices were maintained so as to prevent overflow under ordinary circumstances:—

Held, that the defendants were not liable.

CASE stated in an action brought in the county court of Yorkshire holden at Bradford to recover damages by reason of the overflowing of a reservoir of the defendants.

1. The defendants are the owners and occupiers of a woollen cloth mill situate at Batley, in the county of York, and for the necessary supply of water to the mill is a reservoir, also belonging to the defendants. Such mill and reservoir have been built, and constructed, and used as at the time of the overflowing of the reservoir hereinafter mentioned, for many years.

2. The plaintiff is the tenant of premises adjoining the reservoir.

(1) Law Rep. 4 Q. B. 486.

3. The reservoir is supplied with water from a main drain or watercourse. The surplus water from the reservoir passes through an outlet into the main drain or watercourse. The inlet and outlet are furnished with proper doors or sluices, so as (when required) to close the communications between the reservoir and the main drain or watercourse.

4. The whole of the premises are within the borough of Batley, and the defendants have the right to use the main drain or watercourse by obtaining a supply of water therefrom and discharging their surplus water thereinto, as hereinbefore stated, but have otherwise no control over the drain or watercourse, which does not belong to them.

5. In the month of December, 1877, the plaintiff's premises were flooded by reason of the overflowing of the defendants' reservoir.

6. Such overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third party, into the main drain or watercourse at a point considerably above the defendants' premises, and by an obstruction in the main drain or watercourse below the outlet of the defendants' reservoir, whereby the water from such main drain or watercourse was forced through the doors or sluices (which were closed at the time) into the defendants' reservoir.

7. Such obstruction was caused by circumstances over which the defendants had no control, and without their knowledge; and had it not been for such obstruction the overflowing of the reservoir would not have happened.

8. The defendants' reservoir, and the communications between it and the main drain or watercourse, and the doors or sluices, are constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances.

9. No negligence or wrongful act is attributable to either party.

Under the circumstances the judge of the county court was of opinion that the defendants were liable for the damage sustained by the plaintiff, and accordingly gave judgment for the plaintiff.

The question for the opinion of the Court, having regard to the facts set out in the case, was whether the defendants were liable

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for the damage sustained by the plaintiff by reason of the flooding of his premises, such flooding being caused by water from a reservoir belonging to a third party, over which the defendants had no control, and without any knowledge or negligence on defendants' part, the overflowing of the defendants' reservoir being occasioned by the act of a third party, over whom the defendants had no control, and no wrongful act or negligence being attributable to the defendants, and the direct cause of the damage being the obstruction in the main drain or watercourse, which was caused by circumstances over which the defendants had no control and without their knowledge.

Gully, Q.C. (*George C. Thompson*, with him), for the defendants. The principle on which *Rylands* v. *Fletcher* (1) was decided is to be found in the quotation from the judgment of Blackburn, J., at p. 339. This case is clearly distinguishable. [He was then stopped.]

Bray, for the plaintiff. The defendants are liable as if they had themselves constructed this reservoir. What they have done is to make artificial works which if they overflow may injure their neighbour. They ought to have provided for this by making the sluices and gates so secure as to withstand any pressure the drain would stand. Had this been done they would not have been liable, but they have chosen to make a hole in the drain which if untouched would not have overflown the plaintiff's premises. Having done so, they must do it in such a way that the former security may continue, and the onus is on them to shew that this is the case. [*Nicholls* v. *Marsland* (2) and *Carstairs* v. *Taylor* (3) were referred to.]

Gully, Q.C., was not called on to reply.

Kelly, C.B. I think this judgment must be reversed. The case states that for many years the defendants have been possessed of a reservoir to which there are gates or sluices. There has been an overflow from the reservoir which has caused damage to the plaintiff. The question is, what was the cause of this overflow?

(1) Law Rep. 3 H. L. 330. (2) Law Rep. 10 Ex. 255.
(3) Law Rep. 6 Ex. 217.

Was it anything for which the defendants are responsible—did it proceed from their act or default, or from that of a stranger over which they had no control? The case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow, and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called vis major or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose. The judgment must be entered for the defendants.

Pollock, B. I also think the defendants are entitled to judgment. Looking at the facts stated, that the defendants had no control over the main drain, and no knowledge of or control over the obstruction, apart from the cases, what wrong have the defendants done for which they should be held liable? The case of *Rylands* v. *Fletcher* (1) is quite distinguishable. The case of *Nichols* v. *Marsland* (2) is more in point. The illustrations put in that case clearly go to shew that if the person who has collected the water has done all that skill and judgment can do he is not liable for damage by acts over which he has no control. In the judgment of the Court of Appeal (3) Mellish, L.J., adopts the principle laid down by this Court. He says: "If indeed the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbour—the case of *Rylands* v. *Fletcher* (1) establishes that he must be held liable." Here this water has not been accumulated by the defendants, but has come from elsewhere and

(1) Law Rep. 3 H. L. 330. (2) Law Rep. 10 Ex. 255.
(3) 2 Ex. D. 1, at p. 5.

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added to that which was properly and safely there. For this the defendants, in my opinion, both on principle and authority, cannot be held liable.

Judgment for the defendants. (1)

Solicitors for plaintiff: *Torr & Co., for S. Wooler, Batley.*

Solicitors for defendants: *Layton & Jaques, for Scholefield & Taylor, Batley.*

March 20.

DENNIS *v.* SEYMOUR.

Practice—Specially Indorsed Writ—Leave to Defend as to Part of Claim where Writ specially Indorsed—Order XIV., rule 4.

When upon shewing cause against an application for leave to sign final judgment under Order XIV., the defendant's affidavit admits part of the claim to be due, and discloses a defence upon the merits as to the residue, there is no power under rule 4 to require the defendant to pay to the plaintiff the amount admitted to be due as a condition of being allowed to defend as to the residue. The proper order is that the plaintiff have judgment for the amount admitted; the defendant to be at liberty to defend as to the residue.

WRIT specially indorsed for 70*l.* 16*s.* for goods sold and hired and for the rent of a furnished house. The plaintiff having taken out a summons under Order XIV., rule 1, upon an affidavit that the defendant was indebted in the amount claimed and had no defence, the defendant made an affidavit admitting that 41*l.* 6*s.* of the claim was due, and alleging that he was and had always been willing to pay that amount. As to the residue, 29*l.* 10*s.*, the affidavit disclosed a defence on the merits. The master made an order that the defendant should pay the plaintiff within a week 41*l.* 6*s.*, and that in default the plaintiff should be at liberty to sign judgment for the amount claimed on the writ with costs; and that if the 41*l.* 6*s.* were paid as aforesaid the defendant should be at liberty to defend the action as to the residue.

The defendant having appealed, Lopes, J., refused to vary the order.

E. H. Palmer, for the defendant, moved to vary the order.

Vesey Fitz Gerald, for the plaintiff.

(1) Leave to appeal was refused.

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PER CURIAM (Kelly, C.B., and Hawkins, J.) Under Order XIV., rule 4 (1), there is no power to require the defendant to pay to the plaintiff the amount admitted to be due as a condition of being allowed to defend as to the residue. The order must be varied thus: the plaintiff to have judgment for 41*l.* 6*s.*, the amount admitted to be due; the defendant to have leave to defend as to the residue.

Solicitor for plaintiff: *H. Luxton.*

Solicitor for defendant: *Durant.*

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March 31.

Contract not to be performed within a Year—Statute of Frauds, s. 4.

The statement of claim alleged that in 1866, the defendant entered into the plaintiff's employment as a foreman tailor for three years, on the terms that if he should leave the plaintiff he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor within five miles of D.; and that on the expiration of the three years he continued in the plaintiff's employment on the like terms (except as to the period of employment) till 1877. Breach that in 1877, the defendant left the plaintiff, and carried on business as a tailor in D. The statement of defence alleged that the contract was not in writing as required by the Statute of Frauds:—

Held, on demurrer, by Hawkins, J., that the contract amounted to an agreement not to set up the trade during the joint lives of the defendant and the plaintiff; and was therefore primâ facie not to be performed within a year, and therefore fell within s. 4 of the Statute of Frauds.

DEMURRER to part of a defence.

The statement of claim alleged as follows:—

1. The plaintiff is an outfitter and tailor carrying on business in Fore Street, Devonport.

2. In or about October, 1866, the defendant entered into the

(1) Order XIV., rule 4: "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution or the payment of the amount levied or any part thereof into court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim."

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employment of the plaintiff as a foreman tailor for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor or outfitter, within five miles of Devonport.

3. The defendant on the expiration of the said period of three years, continued in the employment of the plaintiff on the like terms, except as to the period of employment, until the end of October, 1877.

4. At or about the end of October, 1877, the defendant left the plaintiff's employment, and shortly afterwards began to carry on business as a tailor and outfitter, in Fore Street, Devonport, being the same street in which the plaintiff carries on his said business, and he has since continued, and still continues to carry on such business at the place aforesaid, contrary to the provisions of his said contract, whereby the plaintiff has been injured, &c.

The statement of defence alleged in paragraph 4, " that neither the alleged contract nor any memorandum or note thereof was or is in writing signed by the defendant or any other person by him lawfully authorized, and the defendant relies on the statute commonly known as the Statute of Frauds, as affording a defence to this action on the ground that the alleged contract was an agreement not to be performed within the space of one year from the making thereof."

The plaintiff demurred to this paragraph.

March 24. *Anstie*, for the plaintiff, was stopped.

Arthur Charles, Q.C. (*Ringwood*, with him), for the defendant. This is an engagement for an indefinite term and therefore primâ facie for so long as the defendant's life should last. Therefore it is for more than a year, and is an " agreement that is not to be performed within the space of one year from the making thereof," within s. 4 of the Statute of Frauds: *Eley* v. *Positive, &c., Assurance Company*, per Kelly, C.B., Cleasby and Amphlett, B.B. (1) This ground of decision was not touched by the Court of Appeal, who confirmed the decision on the ground that there was no contract at all. (2) The fact of the engagement being defeasible

(1) 1 Ex. D. 20. (2) 1 Ex. D. 88.

within the year by death, misconduct, notice, or otherwise, does not take it out of the the statute: *Dobson* v. *Collis*, per Alderson, B. (1); *Roberts* v. *Tucker*. (2) *Knowlman* v. *Bluett* (3) does not touch the present question. It never could have been intended that this defendant should be bound for one year only.

Anstie, in reply. The cases on defeasance of the agreement within the year have no application to the present, which is governed by an unbroken series of decisions—see notes to *Peter* v. *Compton* (4); which establish that the statute means an agreement which the parties intended should not be, or which from its terms is incapable of being, performed within the year: as to pay an annuity: *Sweet* v. *Lee* (5); or to publish annual numbers of Shakespeare: *Boydell* v. *Drummond* (6); or to maintain a child of five years till she should be able to support herself: *Farrington* v. *Donohoe* (7); and does not extend to cases where the thing may be performed within the year, as a promise to leave money by will: *Fenton* v. *Emblers* (8), where Denison, J., said, "A contingency is not within it, nor any case that depends on contingency:" *Ridley* v. *Ridley* (9); or that the executor shall pay money: *Wells* v. *Horton* (10); or to pay "one guinea a day so long as Napoleon Bonaparte should live:" *Gilbert* v. *Sykes* (11); or to maintain a child so long as the defendant should think proper: *Souch* v. *Strawbridge* (12); or to maintain a person during his life. In *Murphy* v. *O'Sullivan* (13), it was held by the Queen's Bench and also by the Court of Error, that "an agreement to maintain a young person during his life" was not within the statute, see per Monahan, C.J., in *Farrington* v. *Donohoe*. (14) There is no presumption at all in law as to the length of future life, and this was the ground of both those Irish decisions. There is no distinction in principle between the cases of continuous performance and the present one of continuous non-performance of

(1) 1 H. & N. 81, 83; 25 L. J. (Ex.) 267, 268.
(2) 3 Ex. 632.
(3) Law Rep. 9 Ex. 1, 307.
(4) 1 Sm. L. C. 5th ed. 283.
(5) 3 Man. & G. 452.
(6) 11 East, 142.
(7) Ir. Rep. 1 C. L. 675.
(8) 3 Burr. 1278, 1281.
(9) 34 L. J. (Ch.) 462, per Romilly, M.R.
(10) 4 Bing. 40.
(11) 16 East, at pp. 152, 154.
(12) 2 C. B. 808.
(13) 11 Ir. Jur. (N.S.) 111.
(14) Ir. Rep. 1 C. L. at p. 679.

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some act. To this series of authorities there is only one exception, *Eley* v. *Positive, &c. Assurance Company* (1), where those authorities were not cited, and where it was unnecessary to decide the question, because in the Court below and in the Court of Appeal, it was held there was no consideration moving from the plaintiff and therefore no contract at all.

[*Charles, Q.C.*, pointed out that the judgment of the Chief Baron rested on the Statute of Frauds alone.]

Cur. adv. vult.

March 31. HAWKINS, J. The question raised by this demurrer is whether the contracts set forth in the 2nd and 3rd paragraphs of the statement of claim fall within the 4th section of the Statute of Frauds. The 2nd paragraph alleges that "in or about the month of October, 1866, the defendant entered into the employment of the plaintiff as a foreman tailor for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor or outfitter within five miles of Devonport." The 3rd paragraph alleged that "the defendant, on the expiration of the first period of three years, continued in the employment of the plaintiff on the like terms, except as to the period of employment, until the end of October, 1877." The breach alleged was, that having at the end of October, 1877, left the plaintiff's employment, he did set up in business, &c.

I am of opinion that the contracts fall within the 4th section of the Statute of Frauds as agreements not to be performed within the space of one year from the making thereof. Upon the first contract for three years it is impossible to raise a doubt. The case, however, has been argued as though it rested upon a new contract of employment for an indefinite period after the expiration of the three years, and an agreement on defendant's part never after that employment should cease to set up business as a tailor or outfitter within five miles of Devonport. As thus presented I have considered the case. The law upon the subject is now well established. A contract which according to its terms is primâ

(1) 1 Ex. D. 20, 88.

facie not to be performed within a year, is not the less within the statute because it is made defeasible by a contingency which may occur within that period. Thus a contract of service for two years is none the less within the statute because it is made terminable by the death of either of the parties, or by notice, or by the misconduct of the servant, at any period of the service. *Dobson* v. *Collis* (1) is an express authority to this effect. *Roberts* v. *Tucker* (2) is a striking authority in support of the same doctrine. That was an action by a stipendiary curate against the incumbent of a parish, founded upon an alleged promise made by the defendant to the plaintiff to take all necessary measures for obtaining the payment of an *annual* grant from the Society for Promoting the Employment of Additional Curates in *each* and every year, &c. At the trial before Coltman, J., he nonsuited the plaintiff upon the ground that the contract fell within the 4th section of the Statute of Frauds. On motion to set aside that nonsuit, Parke, B., and Alderson, B., upheld that ruling, the latter saying, "The case of a defeasible contract, where the contract may be defeated or put an end to within the year, is not for that reason taken out of the operation of the Statute of Frauds."

Sweet v. *Lee* (3) further illustrates the same now well-recognised proposition. There the contract was for an annuity for life, and the Court held it to be within the 4th section, though it *might*, by the death of the annuitant, be terminated at any time. Upon the same principle in *Farrington* v. *Donohoe* (4) it was decided that a verbal agreement to maintain a child aged five years till she was able to do for herself, was within the statute, although the child might die within a year, for it was clear that if she lived the contract was not to be, i.e., could not be in the contemplation of anybody performed within that period. The same view was taken by this Court in *Eley* v. *Positive, &c., Assurance Company* (5), where it was held that the engagement of the plaintiff as solicitor to the company during his whole professional life, and so long as the defendants continued a company, was a contract

(1) 1 H. & N. 81; 25 L. J. (Ex.) 267.
(2) 3 Ex. 632.
(3) 3 M. & G. 452.
(4) Ir. Rep. 1 C. L. 675.
(5) 1 Ex. D. 20.

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not to be performed within a year, though it *might* be determined by the death or resignation of the plaintiff himself, or by his dismissal for misconduct, within that period.

On the other hand a contract which primâ facie and from its terms may be performed within a year, however improbable that it will be so, and even though the parties to it at the time of making it expected its endurance beyond that period, does not fall within the statute, and it is immaterial that the performance of it is, by the natural course of events, delayed for a much longer period. The most familiar illustration of this proposition is the case of a servant hired generally, whose service may be determined by reasonable notice at any time. Such a contract does not fall within the operation of the statute, though the service may continue and the contract remain unterminated for many years: *Beeston* v. *Collyer*. (1)

Fenton v. *Emblers* (2) well illustrates the law in this respect. That was an action brought by the plaintiff against the executor of a person named May, upon a promise of May by his last will and testament to give and bequeath to the plaintiff a legacy or annuity of 16*l*. by the year, to be paid and payable to her yearly and every year from the day of the decease of the said May, for and during the term of her natural life. It was objected that this agreement was within the 4th section of the statute, and ought to have been in writing, for that it was not to be performed within a year, since a whole year from May's death was to elapse before the annuity would become payable. It was answered, however, that the action was brought for May's not having done what he ought to have done in his lifetime, viz., make his will, which might have been done within the year. Denison, J., said the statute does not extend to cases where the thing *may* be performed within the year; and Wilmot, J., said, "The statute only extends to such promises when by the express appointment of the party the thing is *not* to be performed within a year:" see also *Ridley* v. *Ridley*. (3)

Souch v. *Strawbridge* (4) was an action for the maintenance of a child placed by the defendant in 1842 under the care of the

(1) 4 Bing. 309.
(2) 3 Burr. 1278.
(3) 34 L. J. (Ch.) 462.
(4) 2 C. B. 808.

plaintiff, upon an agreement by the defendant to pay 5*s.* per week or one guinea per month, until the defendant gave notice, or as long as the defendant should think proper. The child remained with the plaintiff till 1845. The Court of Common Pleas held that the case was not within the statute, for there was no certain time fixed for the duration of the contract, but it was to endure for an indefinite period, subject to be put an end to at any time at the option of the defendant, and that contingency might defeat the contract within a year.

Upon the same principle *Knowlman* v. *Bluett* (1) was decided in this Court. There the contract was that the plaintiff should take charge of the seven illegitimate children of which the defendant was the father, and that the defendant should give her 300*l.* a year, payable quarterly, to keep them. The Court held the case not to be within the statute, for the reason given by Bramwell, B., namely, that "the sum may be called an annuity, but really the engagement was not binding on either party for any definite space of time," and that the defendant might at the end of any quarter have refused to provide for the maintenance of the children any longer, and in like manner the plaintiff might have declined to continue to take charge of them. The contract *might* have been performed within the year, though no doubt both parties *expected* it would last longer. This judgment was appealed against (2), but the appeal was disposed of upon another ground.

In the case now before me, the contract set out in the statement of claim amounts to an agreement on the defendant's part not to set up the trade of a tailor or outfitter within five miles of Devonport during the joint lives of himself and the plaintiff. Primâ facie, therefore, it was not to be performed within a year, and therefore fell within the operation of the 4th section of the Statute of Frauds. My judgment, therefore, is for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Crowder, Anstie, & Vizard, for T. C. Brian, Plymouth.*

Solicitors for defendant: *Gush & Phillips, for J. P. Pearse, Plymouth.*

(1) Law Rep. 9 Ex. 1.

(2) Law Rep. 9 Ex. 307.

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April 1.

COOPER *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Deposit of Money under Contract—Forfeiture of Deposit—Performance of Contract Condition precedent to Right to recover Deposit.

The plaintiff bought from the defendant company a season ticket entitling him to travel by their railway for one month, paying the usual charge for such a ticket, and 10*s.* deposit, and agreed to be bound by certain conditions. The 4th condition was that the ticket "is to be considered as the property of the company to be delivered up at the secretary's office on the day after expiry or on forfeiture." The 6th condition was "That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company, if it shall be lost, or in case of any breach of any of the above conditions." Some few days after the expiry of the month, but within a reasonable time, the plaintiff delivered up the ticket and claimed the deposit; and on the company's refusal brought an action to recover it:—

Held, that the performance of every one of the conditions was a condition precedent to the right to a return of the deposit; and that as the ticket had not been delivered up "on the day after expiry" the conditions had not been performed, the deposit was forfeited, and the plaintiff could not maintain the action.

CASE on appeal from the City of London Court.

1. This is an action which was commenced in the City of London Court to recover the sum of 10*s.*, deposited by the plaintiff with the defendants under the circumstances hereinafter mentioned.

2. On or about the 30th day of September, 1876, the plaintiff applied at the season ticket office of the defendants for one of their season tickets, to entitle him to travel for one month to and fro between London and Brighton. He thereupon signed a memorandum agreeing, as the holder of his then present or any future main line season ticket, to abide by and conform to the following conditions:—

"Conditions upon which Main Line Season Tickets are issued and accepted.

"1. That it is to be used subject to and in conformity with the company's bye-laws, rules, regulations, and time-tables from time to time in force.

"2. That it is available only at and between the two stations named thereon, including intermediate stations, but no other.

"3. That it is not to be transferred to or used by any person other than the person named thereon, and who has signed these conditions.

"4. That on every demand it is to be shewn to any officer or servant of the company, and *that it is to be considered as the property of the company, to be delivered up at the secretary's office on the day after expiry, or on forfeiture.*

"5. That the company are not to be liable for any stoppage, hindrance, or delay in respect to the starting, speed, or arrival of the train, whether arising from any accident, negligence, or other cause.

"6. *That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company, if it shall be lost, or in case of any breach of any of the above conditions.*

"7. If the holder wishes to perform any other journey than than that for which the ticket is available, he must, before starting, pay the excess or other proper fare and take a ticket as an ordinary passenger, failing which he must pay the full fare from the point of starting."

3. The plaintiff at the same time paid to the defendants the usual charge for the season ticket and also the usual deposit of 10*s.* thereon.

4. The season ticket applied for by the plaintiff was then filled up and handed to him by the defendants. On the back thereof was indorsed a copy of the aforesaid conditions with the words, "I agree to the above" signed by the plaintiff.

At the foot of the indorsement below the plaintiff's signature there is also the following note on the ticket:—

"In the event of this ticket being lost a reward of 10*s.* will be given to any person who brings it to the secretary, London Bridge station."

5. At the expiration of the month for which the season ticket was available the plaintiff returned the same to the defendants, and upon the same conditions obtained from the defendants another similar season ticket indorsed and signed as before.

6. It is the practice of the defendants, and, as a fact, the defendants, on or about the 24th day of November, 1876, sent by

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post to the plaintiff a printed notice reminding him that the time for using the said season ticket would expire on a day therein mentioned, and that if he did not wish to renew it, he ought to return it immediately upon expiry, in order that the deposit might not be forfeited according to the condition indorsed thereon.

7. The said season ticket was returned to the defendants as stated by the plaintiff "some few days" after its expiration, the plaintiff at the same time requesting the return of the 10*s.* deposit, which was refused by the defendants, on the ground that the ticket was not returned ou the "day after expiry," as required by the conditions. The Court found as a fact that the said ticket was returned within a reasonable time in that behalf.

8. The action was tried on the 15th day of October, 1878, when the Court gave judgment for the plaintiff, but, at the request of the defendants, gave them leave to appeal on the terms of their paying the costs of the appeal.

9. The question for the Divisional Court is whether or not under the circumstances aforesaid the plaintiff is entitled to recover.

March 28; April 1. *Jeune* (*Moseley*, with him), for the defendants. The only questions are, what is the contract, and has the plaintiff performed his part? No question arises whether the contract was reasonable or not. The company require the return of the ticket on the very day after its expiry, to prevent the numerous frauds practised upon them by the abuse of season tickets. The question whether a sum named is intended as a penalty or liquidated damages does not arise in the case of a deposit and a clause of forfeiture; even where, instead of a deposit of money, an I. O. U. is given: *Hinton* v. *Sparkes*. (1) Such a question arises only where the party insisting on the forfeiture has to sue. Here the company need not sue, they simply keep the deposit. The 8 & 9 Wm. 3, c. 11, only applies to persons suing for a penal sum.

C. H. Anderson (*A. M. Bremner*, with him), for the plaintiff. *Hinton* v. *Sparkes* (1) did not lay down any such rule as that

(1) Law Rep. 3 C. P. 161.

suggested. Whatever expressions to that effect are to be found in the judgment are contrary to the well-established rule, and must be considered overruled by the Court of Appeal in *In re Dagenham Dock Co., Ex parte Hulse* (1), where the Court relieved against a clause for forfeiture of a deposit of part of the purchase-money, default having been made in payment of the residue on the day named. The forfeiture of the 10*s.* being provided for the breach of many very different conditions, and the use of the word "forfeited" in the 6th condition, shew that the 10*s.* is to be regarded as a penalty and not as liquidated damages, per Bramwell, B., in *Betts* v. *Burch* (2); *In re Newman, Ex parte Capper.* (3) In such a case equity will relieve: Story, Eq. Jur. § 1314; Dart. Vend. p. 305. Then being a penalty the company can only retain as much of the deposit as represents their actual damage. Here they shew none and have no counter-claim. The return of the ticket on the very day after expiry is not a condition precedent to a right to sue for the deposit, because the stipulation for the return does not go to the root of the matter, but only partially affects it, and may be compensated for in damages: per Blackburn, J., in *Bettini* v. *Gye* (4); *Woolfe* v. *Horne.* (5)

Jeune, in reply. No claim for relief in equity is shewn on the case. If parties choose to make such a contract they are bound by it: *Lea* v. *Whitaker* (6); *London Tramways Co.* v. *Bailey.* (7)

KELLY, C.B. This case involves the determination of a question of little importance to the plaintiff, but of which it is difficult to exaggerate the importance to the defendants in their extensive operations. I think the matter when looked at is perfectly clear. The plaintiff bought a monthly season ticket from the defendants. We do not know the price, but the plaintiff deposited 10*s.* and agreed with the defendants upon certain conditions. The third condition is such that if broken great frauds may obviously be practised upon the company, by a ticket holder lending his ticket to a friend or otherwise transferring it. Then comes the fourth

(1) Law Rep. 8 Ch. 1022.
(2) 4 H. & N. 506, 510; 28 L. J. (Ex.) 267, 270.
(3) 4 Ch. D. 724.
(4) 1 Q. B. D. 183, 188.
(5) 2 Q. B. D. 355.
(6) Law Rep. 8 C. P. 70.
(7) 3 Q. B. D. 217.

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condition which the plaintiff's counsel says ought to be read as if the words "on the day after expiry" were struck out and the words "within a reasonable time after expiry" were substituted for them, so that the condition would run "the ticket is to be considered as the property of the company, to be delivered up at the secretary's office within a reasonable time after expiry, or on forfeiture." But what is "a reasonable time," and who is to determine what is reasonable? It would vary in each case according to the circumstances. Such an alteration of the words would be to make a new contract for the parties which they did not make for themselves, and to hold that they were not bound by the words they have used.

Then at the foot of the conditions indorsed on the back of the ticket there is this note: "In the event of this ticket being lost, a reward of 10*s.* will be given to any person who brings it to the secretary, London Bridge station."

The sixth condition provides "That the ticket and all benefit and advantages thereof, including the deposit, shall be absolutely forfeited to the company if it shall be lost, or in case of any breach of any of the above conditions."

Now if the ticket be lost, and yet there is no forfeiture, the consequences will be that the company may pay 10*s.* to the finder who brings the lost ticket to them, and also be obliged to pay the 10*s.* over again in such an action as the present to the season ticket holder. That is a case very likely to happen where a man by accident loses his ticket out of his pocket.

We cannot release the plaintiff from any one of these stipulations, or hold that a breach of any one of them is not a cause of forfeiture, without holding that the whole of them are void. If the plaintiff can set up an equitable claim for relief, on the ground that the condition as to forfeiture of the deposit must be considered as a penalty and not as liquidated damages—if that is so as to a breach of any one of the conditions, it must be so as to a breach of every one of them.

There is nothing illegal or inequitable in these conditions. To the defendants it is of the greatest importance that they should have in their books a statement of the number and description of their season tickets, so that they may know what tickets are in

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force and what are not, and they have a right to impose on the purchasers of season tickets—which no one need buy unless he likes — conditions of forfeiture. No one can tell what consequences may ensue to the company from the breach of any of the conditions.

The cases cited, where courts of equity have interposed or relieved from forfeiture, have no application to the present case. Every case, whether that of a claim of a tenant to be relieved from forfeiture for non-payment of rent or any other claim, must be determined on its own circumstances.

Looking at the particular circumstances of this case there will be no hardship whatever on the plaintiff, but the greatest hardship on the defendants, if the contract is not strictly performed. I think every word and letter of the contract must be strictly construed and enforced, and therefore that in the present case a forfeiture has been incurred.

HAWKINS, J. I am of the same opinion. When the contract entered into between the plaintiff and defendants is looked at the matter is clear. The plaintiff seeks to recover 10*s.* deposited with the defendants at the time when they issued to him a season ticket entitling him to travel for one month. The 10*s.* were deposited subject to a stipulation that they should be forfeited if any one of certain conditions were broken. The fulfilment of those conditions was therefore a condition precedent to a right of action to recover the money. Now it is clear that the fourth condition has not been fulfilled, because the ticket was not delivered up "on the day after expiry." The plaintiff's counsel contends that the condition ought to be read as if those words were not there, and and there were substituted for them the words "within a reasonable time." There is no ground for such a reading, and it is clear from the sixth condition that the 10*s.* are forfeited, and cannot be recovered unless each stipulation is fulfilled. Whether it be a reasonable or unreasonable condition that the ticket be given up on the very day after expiry is not a question in the present case; but if it were I should say it was very reasonable, for I can see that there is great danger of frauds being extensively practised on

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the company if season tickets are not delivered up as soon as they expire.

But my judgment in favour of the appellants rests on the terms of the contract, that the deposit is to be returned only on fulfilment of every one of the conditions, and that one of these conditions has been broken.

Judgment for the defendants. (1)

Solicitor for plaintiff: *T. C. Russel.*

Solicitors for defendants: *Norton, Rose, Norton, & Brewer.*

March 17.

THE SWANSEA BANK, LIMITED, *v.* THOMAS, TRUSTEE OF THE ESTATE OF JOHN LEWIS WILLIAMS, IN LIQUIDATION.

Landlord and Tenant—Assignee assigning over—Apportionment of Rent—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 3, 4.

The residue of a term under a lease having become vested in the trustee of the lessee, who was a liquidating debtor, the trustee assigned over during a current quarter. In an action, brought after the expiration of the quarter against the trustee by the lessor, to recover a proportionate part of the quarter's rent up to the time of the assignment over by him:—

Held, that the Apportionment Act, 1870, applied, and that the lessor was entitled to recover.

SPECIAL CASE stated by consent, from which the following facts appeared:—

John Lewis Williams, in April, 1875, became tenant of a house and premises at Swansea under a lease for twenty-one years, at a specified rent payable quarterly on the usual quarter days.

The lease contained a covenant that the lessee would not assign, underlet, or part with the possession of the premises without licence in writing. There was a proviso for re-entry on non-payment of rent or breach of covenant. In August, 1877, the reversion of the premises expectant upon the term of twenty-one years became vested in the plaintiffs.

In March, 1876, John Lewis Williams entered into an arrange-

(1) Leave to appeal was refused, except on the terms (which the plaintiff's counsel declined to accept) that the plaintiff should give up the benefit as to costs imposed by the Judge of the City of London Court.

ment with his creditors for liquidation of his affairs by arrangement. The defendant was appointed trustee in April, 1876, and entered into possession and paid the rent reserved by the lease up to the 29th of September, 1877.

In November of the same year the defendant applied to the county court, under the Bankruptcy Act, 1869, for leave to disclaim the leasehold interest in the premises, but the application was refused.

On the 6th of December, 1877, the defendant, by deed, assigned the premises to one Edward Thomas for the unexpired residue of the term of twenty-one years, but no licence was given for such assignment, nor did the plaintiffs accept Edward Thomas as their tenant of the premises.

The question for the opinion of the Court was whether the plaintiffs were entitled to recover from the defendant the whole of the rent payable in respect of the house and premises for the quarter ending on the 25th of December, 1877, or an apportioned part thereof for the portion of the quarter ending on the 6th of December, 1877, or any and what part of such rent.

C. James, for the plaintiffs, did not contend that the trustee was liable for the quarter's rent, but argued that the claim for a proportioned part of the rent was well founded, on the ground that the Apportionment Act, 1870 (1) made the rent accrue from day to day. He was then stopped.

Wills, Q.C. (*Brynmor Jones*, with him). The Act of 1870

(1) 33 & 34 Vict. c. 35, an Act for the better Apportionment of Rents and other Periodical Payments, recites: "Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising, divers statutes have been passed," enumerating 11 Geo. 2, c. 19, 4 & 5 Wm. 4, c. 22, 6 & 7 Wm. 4, c. 71, 14 & 15 Vict. c. 25, and 23 & 24 Vict. c. 154. "And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences, be it enacted . . . . as follows:—

"2. From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

By s. 3 the apportioned part of rent, &c., is to be payable when the next entire portion shall have become due.

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intended that there should be one action for rent, and that the parties should apportion it themselves, not that there should be two rights of action. The Act is in continuation of prior Acts, and should be interpreted with reference to the evils intended to be remedied by those Acts. Here the incoming tenant would be liable for the quarter's rent due at Christmas. It must be admitted that unless the case is within the proviso to s. 4 (1), then it will be within s. 2.

C. James, was not called upon to reply.

PER CURIAM (Kelly, C.B., and Huddleston, B.). The words of s. 2 of the Apportionment Act are wide enough to include this case, and the plaintiffs are entitled to recover an apportioned part of the rent for the time the defendant was in occupation.

Judgment for the plaintiffs. (2)

Solicitors for plaintiffs: *Vizard, Crowder, & Anstie, for Brown, Collins, & Wood, Swansea.*

Solicitors for defendant: *Hacon & Turner, for C. H. Glascodine.*

(1) 33 & 34 Vict. c. 35, s. 4: "All persons, and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively; provided that persons liable to pay rents reserved out of, or charged on, lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity."

(2) Query, whether the Apportionment Act, 1870, was intended to introduce any new law as between landlord and tenant, or payer and recipient, or to do more than regulate further, between themselves, the rights of those who have to receive rents, annuities, dividends, and other periodical payments?

JONES, APPELLANT; THE CWMORTHEN SLATE COMPANY, LIMITED, RESPONDENTS. 1879 *March* 5.

Revenue—Slate Quarry—Underground Working—5 & 6 Vict. c. 35, s. 60, Sched. A, No. 3.

Works for the getting of slate are assessable to the income tax under 5 & 6 Vict. c. 35, sched. A, as quarries of slate and not as mines, though all the slate is obtained by underground working.

CASE stated by Commissioners of Income Tax.

The respondents appealed against a charge of 6373*l.* made upon the company in the assessment under Schedule D for the parish of Festiniog, for the year 1877–8, in respect of profits as a slate company, under Rule 1 of No. 3 of Schedule A (5 & 6 Vict. c. 35).

The respondents contended that the concern was a mine, and claimed to be assessed on the average profits of the five preceding years, under Rule 2 of No. 3 of Schedule A (5 & 6 Vict. c. 35) on the ground that the concern came under the title "and other mines."

It was explained that originally the concern was worked in the open, but for some years the slates have been got by means of levels driven straight into the mountain to a distance of from 250 to 300 yards; those levels were about five feet wide and seven feet high, and the whole process was carried on underground. Under the Metalliferous Mines Act (35 & 36 Vict. c. 77) they were deemed to be a mine, and also for poor-law and other purposes.

A short-hand note of an argument and judgment in the Court of Queen's Bench in a case in which the respondents were defendants was also put in, in which the Court held the concern to be a mine. (1)

The appellant, the Surveyor of Taxes, argued that the concern was a quarry, and that the wording of Rule 1 of No. 3 of Schedule A (5 & 6 Vict. c. 35), as follows, "of quarries of stone,

(1) *Sims* v. *Evans*, before Blackburn, Quain, and Field, JJ., on the 2nd of June, 1875, not reported.

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slate, limestone, or chalk, on the amount of profits in the preceding year," was decisive of the question, and that it was impossible to regard a slate quarry as a mine under Rule 2, which applies to "mines of coal, tin, lead, copper, mundic, iron, and other mines."

The commissioners were of opinion that the concern was a mine, and gave their decision accordingly, but stated this case for the opinion of the Court.

Dicey, for the appellant. Primâ facie, this property was assessable as a quarry under the first part of Rule 3, and it lies on the respondent to shew that the fact is otherwise. The Act is intended to mark the difference in the produce, and to impose a different mode of assessment on the two classes of produce.

A. L. Smith, for the respondents. The words of the Act cover all mines by the expression "other mines." This open working or quarry has been converted into a mine, and must be assessed accordingly. The case of the *Duchess of Cleveland* v. *Meyrick* (1) is a direct authority. There the testator bequeathed his shares in mines, and shares in what had been a slate quarry but had become an underground working for slate were held to pass. Malins, V.C., on a review of the cases, said: "Therefore I find that the authorities both at law and in equity concur in this, that if the operations carried on are in fact mining operations and not surface operations, whatever may be the material gained, whether it be slate, as in the present case, limestone, as in *Rex* v. *Inhabitants of Sedgley* (2), or clay, as in *Rex* v. *Brettell* (3), the criterion is not the material obtained, but the mode in which it is obtained." In *Sims* v. *Evans* (4), referred to in the case, the question arose under the Metalliferous Mines Act, 1872 (35 & 36 Vict. c. 77), which requires all mines to be guarded. It was conceded by counsel for the company that this was a mine within the provisions of the Poor Law Act, and the Court decided that it was a mine "with a shaft for the purpose of getting minerals, to wit, slates."

Dicey was not called on to reply.

(1) 37 L. J. (Ch.) 125.
(2) 2 B. & Ad. 65.
(3) 3 B. & Ad. 424.
(4) *Sims* v. *Evans*, before Blackburn, Quain, and Field, JJ., on the 2nd of June, 1875, not reported.

KELLY, C.B. We may either construe these words in their popular sense or we may look to the precise words of the Act, and see if we can deduce from them the intention of the legislature. We do not hear the term "slate mine" used in common parlance, the expression being "slate quarry," and I should hesitate, in the absence of special circumstances, to hold that a slate quarry could be a mine. In the case to which reference has been made, argued in the Court of Queen's Bench, the largest interpretation was put upon the expression, because the object of the statute with which the Court was concerned was to protect the lives and limbs of her Majesty's subjects. Looking at this Act, there are two descriptions of property to be liable to the income tax, the one quarries of stone, slate, limestone, or chalk, on the amount of profit in the preceding year; the other, mines of coal, tin, lead, copper, mundic, iron, and other mines. If slate had been intended to be included in this second clause, they might have repeated it, and the absence of the expression "mines of slate" looks as if the distinction were purposely pointed out, and confirms the view I take on the popular signification of the words.

In construing this statute which relates to the taxation of the subject, we must look to the precise words used. So doing, in my opinion the subject-matter of this appeal is taxable as a quarry and not as a mine, and comes within the first rule only.

POLLOCK, B. I am of the same opinion. The true mode of dealing with the question is to take the statute in which the words occur, and see what from these words must be taken to be the intention of the legislature, giving to the words the best meaning to carry out that object. In the case of the *Duchess of Cleveland* v. *Meyrick* (1) no such question arose as here. There were no other mines to which the words of the will would refer, and if those words did not pass the slate quarries, there was an intestacy as to that part of the testator's estate. In the case in the Queen's Bench the object and intention of the legislature was to shield persons from danger. Now, whatever the output of the mine, protection is required according to the character of the working, not of the output. Further, the interpretation clause in the 41st

(1) 37 L. J. (Ch.) 125.

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section of the Metalliferous Mines Regulation Act shews that the word "minerals" is used there in its widest sense.

In the Income Tax Acts the words are perfectly distinct in the two parts of the rule. In the one case the expression used is "quarries," in the other "mines." It is impossible not to see that there is an antithesis between these expressions, and looking to that and to the fact that no man sinks a shaft to get slate, it seems to me that this was a quarry, and that the appellant is entitled to our judgment.

Judgment for the appellant.

Solicitor for Crown: *Solicitor for Inland Revenue.*
Solicitors for respondents: *Gregory, Rowcliffes, & Rawle.*

March 5.

RILEY, APPELLANT; READ, RESPONDENT.

Revenue—Inhabited House Duty—Inhabited Dwelling-house—48 *Geo.* 3, *c.* 55, *Sched. B, No.* 5—14 *&* 15 *Vict. c.* 36.

A building was used part of it as a club and the remainder as an auctioneer's office. It was only occupied during the day and no person slept there:—

Held, that it was not an inhabited dwelling-house so as to be liable to inhabited house duty under 14 & 15 Vict. c. 36.

CASE stated by commissioners for the general purposes of the income tax, and for executing the Acts relating to the inhabited house duties.

The appellant, on behalf of the Working Men's Reform Club, William Street, in the township of Over Darwen, appealed against an assessment to inhabited house duty, for the year ending the 5th of April, 1877, upon the annual value of the building occupied by the club.

The appellant claimed exemption on the ground that the building was not an inhabited dwelling-house within the meaning of the Act 14 & 15 Vict. c. 36, inasmuch as the place was not, and never had been since its erection, furnished as a dwelling-house or slept in at night, and was used during the daytime for club and trade purposes only. He stated that the upper floor of the

building was let to an auctioneer, who used it during the daytime as a place for sale of goods, and, being a place used entirely for trade purposes, was not liable to inhabited house duty.

The respondent, the surveyor of taxes, stated that he had seen the premises, and found the building to consist of two storeys. The ground floor was occupied by the appellants as a club, and contained the usual rooms, namely, billiard-room, news-room, lavatory, &c. The upper floor was let to an auctioneer, and used by him as a place of trade. The club was open each day from 9 A.M. to 10.30 P.M., and was then closed for the night, no person remaining inside the premises. The surveyor contended that the building came within the scope of 48 Geo. 3, c. 55, Sched. B, No. 5, and that it was not necessary for a building to be slept in to render it liable to inhabited house duty. In support of these views he referred to case 2760, decided by the judges on the 15th of February, 1867, and contended that as the place was not used for trade, but in the manner above stated, it was not within any of the exemptions contained in the Acts.

The appellant sought to distinguish the present case from the case No. 2760, inasmuch as the present building had never acquired the character of a dwelling-house, by reason of its never having been furnished or slept in as such.

The commissioners were of opinion that the club was liable, but stated this case for the opinion of the Court.

Bush Cooper, for the appellant, contended that the building did not constitute an inhabited dwelling-house, and referred to the schedules A and B of 48 Geo. 3, c. 55, to shew that there was a distinction between an inhabited dwelling-house in respect of which the occupier was charged, and a place where no person slept, in which case the owner was charged, as under Schedule B, rule 5.

Dicey (*Sir H. Giffard, S.G.*, with him), for the Crown, contended that living on the premises at night was not necessary to constitute an inhabited dwelling-house, and that persons dwelt in this house in the daytime. The statute 57 Geo. 3, c. 25, s. 1, speaks of places where no person inhabits, dwells, or abides, except in the daytime, shewing that a nightly residence is not

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necessary to constitute dwelling. He referred to *Rusby* v. *Newson*. (1)

Bush Cooper did not reply.

KELLY, C.B. It appears to me that this claim cannot be sustained. The Acts of Parliament referred to impose a tax on inhabited dwelling-houses, and the question is whether this building is an inhabited dwelling-house within the meaning of those Acts, though no person sleeps there or has slept there. Looking at the description of this building given in the case, it appears that the whole building is occupied either as a club or for trade purposes, and the question is, whether under these circumstances the building is subject to the tax. The statutes say that what is taxable is an "inhabited dwelling-house." If "inhabited house" were the thing mentioned, we should have to consider whether there might not be inhabitancy though no one slept on the premises, but when we find the Acts speak, not of "inhabited houses" but of "inhabited dwelling-houses," we must put a construction not only on the word "inhabited" but on the word "dwelling" as applied to house. Is this such a place unless one or more persons sleep in the house? I think not. If there were any statute defining the expression and shewing that the term dwelling-house was meant to apply to such a place as the present, or if there were any authority to shew that the expression might apply to a mere occupation in the daytime, in other words, if there were either an Act of Parliament or a decision of a Court of Law which shewed that a place might be taxed as an inhabited dwelling-house in which no person slept or had slept, we should be bound by such Act or decision, but in the absence of that, we must put our interpretation on the words of the statutes. My interpretation of "to dwell," is "to live and occupy for all the purposes of life." Is there anything to shew that this is not so? Referring to the dictionaries, in no one do I find the word "dwell" used, except in the meaning of reside or live, and we have not been referred to any writers of the last two or three centuries to shew that the word "dwell" has been used in such a manner that we must interpret it in any other mode. There

(1) Law Rep. 10 Ex. 322.

is something plausible at first sight in the argument founded on the recital of 57 Geo. 3, c. 25, but that Act, in my opinion, referred to cases where, besides the residence, there were separate buildings in respect of which persons have been assessed to and paid duty, such buildings not being physically connected with the residence, or forming part of it, but in connection with it, and I think the preamble refers to such cases.

I think we should take the plain and natural meaning of the word "dwelling," which is equivalent to residing or living day and night, and as this place was not so occupied, the assessment cannot be supported.

POLLOCK, B. In my judgment the members of the club who occupy this building are not properly assessable to inhabited house duty. If it were necessary to decide that in all cases, in order to make a building assessable as an inhabited dwelling-house, some person must sleep on the premises as well as occupy them by day, I should pause before coming finally to that conclusion; though I agree with what has fallen from my Lord, I must admit that there are some passages in the statutes which tend to support the opposite view. I think, however, this is quite a different case from that of a person occupying a place by day, either by himself or his clerks and servants, and another place by night as his ordinary place of abode. This is the case of a number of persons using the premises as a club to which they may resort, and whether such a place should be assessable or not, it seems to me that, looking at the ordinary meaning of the words "inhabited house" and "inhabited dwelling-house," it would be a misapplication of language to apply them to this case. On these grounds I think the assessment is wrong, and cannot be supported.

Judgment for the appellant.

Solicitor for Crown: *Solicitor for Inland Revenue.*
Solicitors for appellant: *Pritchard, Englefield, & Co.*

1879
March 14.

HOUGH & CO. *v.* MANZANOS & CO.

Principal and Agent—Charterparty—Description of Person signing as Agent for Charterers—Unqualified Signature—Liability as Principal.

A charterparty was entered into between plaintiffs, shipowners, and defendants "as agents for charterers." It was signed by the defendants without any qualification, but contained a clause that the ship was to load "from the agents of the said freighters," and a cesser clause that, the charter being entered into on behalf of others, all liability of charterers should cease on completion of loading and payment of advance. In an action for breach of the charterparty, the defendants by their statement of defence denied their personal liability:—

Held, on demurrer, that the defendants were liable on the charterparty.

THIS was an action by the plaintiffs, as owners of the steamship *Ellen*, against defendants as charterers, on a charterparty expressed to be for as many voyages as the ship could do during six calendar months. The alleged causes of action were detaining the ship and refusal to load for the fourth and fifth voyages.

The defence set out the charterparty, which was expressed to be entered into "between Hough & Co., owners of the good steamship or vessel called the *Ellen* or similar boat of the burthen of 900 tons or thereabouts, now at Newport, and Manzanos, Cristobal, & Co., as agents for charterers." The ship was to load "from the agents of the said freighters." (1) The captain was to sign bills of lading at any freight required by the "charterers" not less than certain specified rates. The captain was to have an absolute lien on the cargo for all freight, dead freight, and demurrage due under the charterparty. The charterparty further contained the following clause: "This charter being entered into on behalf of others, it is agreed that all liability of charterers shall cease on completion of loading and payment of advance, captain having a lien on cargo for freight, dead freight, and demurrage." The charter was to be in force for as many consecutive voyages as the vessel could do in six calendar months, to begin on signing first bill of lading; and it was signed by the defendants "Manzanos, Cristobal, & Co.," while the signature on behalf of the plaintiffs was "By authority of Hough & Co., and, as agents p. pr. W. Y. Edwards, Fred. Edwards."

(1) The word "freighters" had not appeared before in the charterparty.

The third paragraph of the statement of defence was that the defendants in making the charterparty were agents for the charterer therein referred to, that is to say, Eusebio Garcia, of Bilbao, in Spain, and they entered into the same on his behalf.

There were demurrers on the part of the defendants to a part of the statement of claim, and a demurrer by the plaintiffs to so much of the defence as denied the personal liability of the defendants.

March 11. *Douglas Walker*, for the plaintiffs. The defendants are liable on the charterparty. They have signed in their own name without any qualification. The rule is correctly laid down in 2 Smith's Leading Cases, in the notes to *Thomson* v. *Davenport* (1), thus: "It may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is primâ facie to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal." A declaration that a party makes a contract on behalf of others, standing alone, does not prevent his suing in his own name: *Cooke* v. *Wilson* (2); and *Oglesby* v. *Yglesias* (3) shews that the defendants are not relieved from liability by the statement that they are agents for the charterers. The defendants have not signed as agents, though the plaintiffs' agents did so, and in view of the cases it cannot be gathered from the charterparty that they were to be taken to be agents.

Hannen, for the defendants. The charterers and the agents are distinguished throughout this charterparty, and the defendants have done everything to shew that they are agents except adding to their signature a second statement of that fact. This omission cannot shew that they intended to be bound as principals. [He cited *Gadd* v. *Houghton* (4); *Paice* v. *Walker*. (5)]

Douglas Walker, in reply.

Cur. adv. vult.

(1) 7th ed. p. 386.
(2) 1 C. B. (N.S.) 153; 26 L. J. (C.P.) 15.
(3) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(4) 1 Ex. Div. 357.
(5) Law Rep. 5 Ex. 173.

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March 14. POLLOCK, B. This case was argued before me on Tuesday last on cross demurrers to a statement of claim and defence. The action was on a charterparty signed by the defendants in their own name, that is, in the name of the firm, without any qualification. In the body of the charterparty the defendants were described as agents for the charterers. The charterparty contained a clause like that called the cesser clause usually inserted in charterparties, by which it was provided that upon the completion of the loading "this charter being entered into on behalf of others all liability of charterers shall cease." The plaintiff claimed for demurrage and damages for not loading the vessel. Two points taken for the defendants were disposed of on the argument, and it is not necessary now to refer to them. The third point was whether under this charterparty the defendants could be sued at all, and this I took time to consider, as the law on the subject is not in a satisfactory state, and I wished to consider the cases further before giving judgment.

On the cases, though I do not say that some of them might not be questioned on appeal, I feel bound to give judgment for the plaintiffs. The defendants have signed the charterparty without any reservation, and the rule of law which has been quoted from Smith's Leading Cases applies. That rule is, that where a person signs a contract in his own name without qualification, he is primâ facie to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal. Now the words "as agents for charterers" do not in themselves, as the cases decided on the subject shew, make that intention apparent. Thus from *Oglesby* v. *Yglesias* (1) it appears that the words "as agent for the freighters" in the body of the charterparty would not relieve the party signing from liability. In *Paice* v. *Walker* (2) the words "as agents for" a named foreign principal were held to be a mere description of the defendants, and not to free them from liability. In *Gadd* v. *Houghton* (3), which was tried before me at Liverpool, the words were "on account of" a foreign principal.

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356.

(2) Law Rep. 5 Ex. 173.

(3) 1 Ex. D. 357.

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In that case I held that the defendants were not liable, and this judgment, though overruled by the Exchequer Division, was upheld in the Court of Appeal. James, L.J., based his decision on the difference between the expressions "as agents for" and "on account of," a distinction I confess I cannot appreciate, but which leaves *Paice* v. *Walker* (1) an authority binding on me here. I think on the cases it is clear that I must, in the present instance, give my judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Lyne & Holman.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

[IN THE COURT OF APPEAL.]

March 22.

GIRDLESTONE *v.* THE BRIGHTON AQUARIUM COMPANY.

Penalty, Action for—Judgment recovered for same Offence—Covin and Collusion —21 Geo. 3, c. 49.

The defendants pleaded in bar to an action to recover a penalty for breach of 21 Geo. 3, c. 49, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced in the name of R., with his consent, while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants and without the interference of R.: it was commenced for the protection of the defendants from any action brought or to be brought in respect of the penalty claimed in it; and also for the purpose of taking the Home Secretary's opinion whether he would remit the penalty:—

Held, affirming the judgment of the Exchequer Division, that the judgment recovered was no bar to an action for the same offence by a different plaintiff.

By Brett, L.J., on the ground that the judgment had been recovered in an action in which the present defendants were, in truth, both plaintiffs and defendants.

By Thesiger, L.J., on the ground that the judgment had been obtained by covin and collusion.

By Cotton, L.J., on both grounds.

APPEAL from the judgment of the Exchequer Division in favour of the plaintiff. (2)

Action for penalties under 21 Geo. 3, c. 49.

The facts are sufficiently stated in the judgments.

(1) Law Rep. 5 Ex. 173 (2) 3 Ex. D. 137.

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The arguments and the cases cited are the same as in the Court below.

Feb. 28. Sir *H. S. Giffard, S.G., Waddy, Q.C.,* and *Bosanquet,* for the plaintiff.

C. Russell, Q.C., and *John Macdonell* (*MacMillan,* with them), for the defendants.

Cur. adv. vult.

March 22. The following judgments were delivered :—

BRETT, L.J. In this case the action is brought by the plaintiff against the defendants to recover a penalty ; and the answer, in point of fact, is that another person had before the plaintiff brought his action recovered a judgment for a penalty for the same offence. To that it is replied, first, that no such person ever recovered such a judgment ; and, secondly, if such judgment was recovered, it was recovered by covin and collusion. The case was tried before Cleasby, B., and it seems to me that his direction to the jury really amounted to this ; that they might find that the suggested previous judgment had no effect, although there was no fraud whatever on the part of either party concerned in obtaining that judgment. The jury thereupon found for the plaintiff; the Exchequer Division have affirmed that judgment. If it were necessary, in my opinion, in order to support the decision of the Court, to say that there had been any fraud, I could not agree with it, because it seems to me that there is not a symptom of fraud from beginning to end. In my opinion, the transaction was an honest transaction, honest in every part of it, and I see no harm, morally speaking, in what was endeavoured to be done. There was a difference of opinion amongst persons as to the propriety of any one suing for penalties under 21 Geo. 3, c. 49 ; and thereupon the solicitor to the defendant company requested a person, who was of opinion that such penalties ought not to be sued for, to sue for the penalty of 100*l.* He did that, no doubt, with two intentions ; one intention was that if other persons should afterwards sue for penalties the judgment obtained upon this suit should be an answer to them. He also did it, because it was supposed that if penalties were recovered the Home

Secretary, exercising his discretion, might (for nobody, of course, could say whether he would) relieve the defendant company from the payment of the penalties. Neither object seems to me to be illegal or immoral in any sense. The defendants' solicitor had requested a person to bring an action, if you please, for the purpose of protecting the company; it is not shewn that that person knew that at that time another action had been commenced; but the fact of his not knowing it is not material, for even if he had known it, I should have been of the same opinion. But the defect in the judgment which was obtained seems to me to have arisen from the over-caution of the defendants' solicitor. If he had asked the person Rolfe to bring the action, and if Rolfe had instructed a solicitor to bring the action and he had brought it, although he had bound himself, as it is said, in honour not to insist upon the payment of the penalty, in the absence of finding of any fraud by the jury I should have thought that judgment was valid, and that it could not have been set aside under a plea of covin and collusion, because the plea of covin and collusion is not proved in its legal effect, unless the jury find there was something wrong in the mind of the parties who had agreed to the judgment. I should think the jury would have to find that there was something wrong in the minds of both the parties. The defendants' solicitor asked Rolfe to allow him, the defendants' solicitor, to bring an action against the defendants, using Rolfe's name, and the supposed plaintiff did not exercise any judgment upon the action. He exercised no control. He did not instruct anybody; he did not become liable to anybody for what was done; he did not know of the course of the action; he did not, in fact, so far as I see, know whether the action was brought or not, the only thing that happened was that he was asked whether he would lend the defendants' solicitor his name in order that the defendants' solicitor might bring an action against the defendants. It shews to my mind that Rolfe never was a plaintiff, and that the only plaintiff in that suit was the defendants' company. Therefore, the defendants' company were the plaintiffs in that suit, and they were also the defendants; therefore the judgment recovered in form was no judgment—no judgment which can be said to have been recovered by a third party. If that be so,

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the plaintiff's judgment is the first judgment that has been recovered, and if the matter had been pleaded not in the form of covin and collusion, but stating the facts, those facts stated upon replication would have shewn that the judgment alleged in the defence was no judgment. Upon that ground, as I say deliberately, it being my opinion that there is no evidence of fraud, or of anything which can in any way be deemed fraud, there was no judgment in Rolfe's action, and, therefore, the plaintiff's is the first judgment, and he is entitled to succeed. It is upon that ground alone that I concur in affirming the judgment of the Exchequer Division.

COTTON, L.J. This was a motion by the defendants, by way of appeal from the decision of the Exchequer Division, for a new trial, on the ground of misdirection by the judge before whom the case was tried.

The action was to recover a penalty under the 21 Geo. 3, c. 49. This Act makes the penalty a debt due to the person who sues for it. The defendants pleaded a judgment in respect of the same offence, that is, keeping open the aquarium on Sunday, the 15th of August, obtained at the suit of Rolfe. The plaintiff replied that the judgment was obtained by covin and collusion, and the jury found for the plaintiff on the issue; and there was a verdict and judgment for the plaintiff. There was an application to the Exchequer Division for a new trial, but that Court refused to interfere, hence the appeal to us.

This action was commenced on the 17th of August, 1875. There was evidence at the trial that in October the solicitor of the defendants saw Rolfe, and that at his request Rolfe authorized him to commence in the name of Rolfe an action against the company, for penalties incurred for keeping open the aquarium on the 15th of August, and on the Sundays intervening between that day and the 20th of October. That the solicitor of the company accordingly instructed the solicitor who appeared on the record, for Rolfe, that this solicitor received no instructions in the matter from Rolfe, that on the 28th of October the company suffered judgment by default, that this judgment had never been enforced, and that although there was no positive agreement that the

judgment should not be enforced against the company, there was an honourable understanding between Rolfe and the company that the action brought in his name was to be a protective action, and that Rolfe should not issue execution. One of the objects in allowing Rolfe to obtain judgment was to ascertain in an action in which the plaintiff was not hostile, whether the Home Secretary would exercise the power given to him by a recent Act, of preventing penalties being enforced, and it was proved that till after the judgment pleaded was confessed, neither Rolfe nor the solicitor who appeared as his solicitor on the record knew of the present action. On this evidence the defendants contended that Rolfe had no intention of defeating the claim of the plaintiff in the present action, and that his intention to protect the company was not sufficient to support the plea of covin and collusion. The learned judge in summing up in effect told the jury that it was not necessary, for the support of this plea of covin and collusion, to shew that Rolfe knew of the plaintiff's action, that even though the object of the company in procuring the action to be brought was to obtain the decision of the Home Secretary, the judgment would be one obtained by covin and collusion if in fact there was no intention to take out execution or otherwise enforce the judgment, and if the intention was to protect the company. The jury on this direction found for the plaintiff, and I am of opinion that there was no misdirection, and that there was ample evidence to support the verdict. There was much argument before us as to the meaning of the word "covin." It may be assumed that the meaning of the reply is that the judgment was obtained by an agreement between Rolfe and the defendants the company. For, even if the word "covin" does not of itself import an agreement between two, covin and collusion do. I am also of opinion that to make an agreement covinous there must be something in it which in the view of the law is deceit. Now, in an action for penalties the plaintiff is, ordinarily and in the absence of agreement between him and the defendant, a person independent of, and adverse to, the defendant, seeking to obtain a judgment as a means of enforcing for his own benefit payment of the penalty. If in such an action, though the plaintiff is apparently independent of the defendant, he has by agreement with the defendant allowed his name to be used

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as plaintiff and authorized the defendant, or his solicitor, to instruct a solicitor to act for him the nominal plaintiff, and there is an agreement or understanding that judgment in the action shall not be enforced, but used as a protection to the defendant against other actions either already brought or which may be brought to recover a penalty given by statute, then the action is one in which the company are in substance both plaintiff and defendant, and this agreement or arrangement is an agreement or arrangement that the position of the parties to the action apparently hostile shall be friendly, that the action and judgment, which purport to be an attack on, shall in fact be a protection to, the defendant, an agreement that the reality shall be different from what is represented. This in my opinion is (even in the absence of any intent to defraud) deceit, and in my opinion though the agreement or arrangement be not legally binding, the judgment confessed or obtained under it will have been obtained by covin and collusion, and cannot be relied on by the defendant in answer to an action in respect of the same matter brought by any other person, and the learned judge so directed the jury. It was urged upon us that, to support the defence of covin and collusion, it was necessary that the agreement should be intended to deprive or defraud the plaintiff in the present action of his claim, that Rolfe had no such intention, and that neither he nor his solicitor knew of the present action till after judgment was confessed in Rolfe's action. But it was stated by the solicitor of the defendants that the object of the action commenced in Rolfe's name was to protect the defendants, that is to defeat the claim of any person who might endeavour to obtain judgment for penalties for keeping open the aquarium on any Sunday covered by that action, and if so, in law the parties to the agreement are to be considered to have intended to defeat the claim of the plaintiff, as one of the general body against whose claims the action brought in Rolfe's name was intended to protect the defendants. It was strongly pressed in support of the appeal that the object of that action was to obtain a judgment on which the decision of the Home Secretary could be taken as to the course which he would adopt, and that this was disregarded by Cleasby, B. In my opinion he was right in so doing. It is unnecessary to consider whether the intention to apply to the

Home Secretary as if Rolfe were an independent plaintiff seeking to enforce payment of the penalties, while in fact he was as plaintiff in the action a mere name used by the company by means of which name the company had obtained a judgment for their own protection, was not in itself an argument against the validity of the judgment. But the circumstance that one of the objects was to apply to and obtain the decision of the Home Secretary, does not in my opinion make the judgment less covinous and collusive if it was obtained in an action in which there was not any real plaintiff, and under an arrangement that it should be used not to recover penalties from the defendants, but to protect the defendants from the claims of others who might probably sue. I may add that the decision might, independently of the reasons which I have already given, be supported on the ground that in substance there was no judgment, the plaintiff on the record having been under the circumstances the defendant under another name.

In my opinion the appeal fails, and must be dismissed with costs.

THESIGER, L.J. I also am of opinion that the decision of the Court below should be affirmed.

The defendants plead in bar to an action to recover a penalty a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced at the request of the defendants' solicitor while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants, and without the interference in any way of the nominal plaintiff. It was an action not brought for the purpose of giving the person named as plaintiff the fruits of it, or indeed any benefit whatever from it, but immediately for the protection of the defendants from any action brought or to be brought against them in respect of the penalties which were claimed in it, and mediately for the purpose of taking the Home Secretary's opinion upon the point whether he would remit such penalties. Apart from any question upon the pleadings, is it possible that a judgment so obtained and in such a suit can bar the plaintiff's action? Was the action in which it was obtained, in substance, anything more than one in which the

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defendants were the real plaintiffs, as well as the nominal and real defendants? I think not, and if it was not, then the mere statement of the character of the action is a sufficient argument against the judgment obtained in it operating as a bar to the present action. But the plaintiff has, in his reply to the statement of defence, impeached the judgment upon the special ground of "covin and collusion." The argument, therefore, before us has been addressed to the question whether the facts of the case establish that the judgment is so impeachable. In dealing with this question I assume that Rolfe, when he assented to an action being brought in his name, was unaware of the fact of the present action having been commenced; I assume, too, that the jury have negatived fraud in the sense of there having been a wicked mind and intent on the part of Rolfe and the defendants, or either of them, in instituting or assenting to the institution of the proceedings which led to the judgment. I think, nevertheless, that they were legally guilty both of covin and collusion. Although the word "covin" is sometimes, especially by old writers, used in the sense of a trick or contrivance devised by one person alone, I think that in a case like the present, and where it is used in conjunction with the word "collusion," it imports a trick or contrivance planned by both parties to the transaction which is alleged to be tainted by it. I go further, and take it to be a trick or contrivance which must be proved to be, to use the language in Co. Lit. 357*b*, "to the defrauding and prejudice of another." Assume all that, and still the contention of the defendants appears to me to be inadmissible. If Rolfe had known of and intended to defeat the plaintiff's bonâ fide action by permitting a sham action to be brought in his own name, it is clear that he would have been a party to a trick or contrivance for defrauding the plaintiff. Prejudicing a bonâ fide action for a statutory penalty by the secret contrivance of a sham one can be nothing less than defrauding. Indeed, it is hardly disputed on the part of the defendants that under such circumstances the allegation of covin and collusion would be established. But if so, surely the intention to prejudice or defraud a class of persons, including the plaintiff, must equally establish the allegation, although the plaintiff was not known to form one of the class

intended to be prejudiced or defrauded. There is legislative authority for this view. The statute 4 Hen. 7, which was passed for the purpose of preventing proceedings taken in good faith to recover the penalties being defeated by sham protective actions, made punishable, under the name of covin and collusion, such actions, not only when brought for the purpose of defeating bonâ fide proceedings already taken—in other words, prejudicing a particular individual; but also of defeating such proceedings, although not yet commenced—in other words, of prejudicing an individual not yet identified and known. The statute also provided that such covin and collusion might be averred, in answer to any plea setting up a recovery in a covinous and collusive action in bar to bonâ fide proceedings. I would only add that although, as has been suggested, the motives of the defendants and Rolfe in endeavouring to obtain the decision of the Home Secretary as to the remission of penalties may have been good, and the end, the keeping the aquarium open on Sundays, may have been a desirable one, it appears to me impossible to hold with reason that the co-existence of such motives, or such an end with motives, ends, and acts, which standing by themselves, constitute covin and collusion, can make the case any the less one of covin and collusion, or in any way remove or lessen the legal consequences which covin and collusion entail.

Judgment affirmed.

Solicitors for plaintiff: *Bridges, Sawtell, Heywood, & Co.*
Solicitors for defendants: *Benham & Tindell.*

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Jan. 25.

FORBES and Another *v.* THE LEE CONSERVANCY BOARD.

Ancient navigable River—Action against Conservators—Public Purposes—Conservators of River not Liable for Obstruction to Navigation.

The defendants were an unpaid body of trustees created by statute conservators of the Lee, an ancient navigable river, and were "authorized and empowered from time to time at their discretion to cleanse, scour, deepen, enlarge or straighten the channel or course of the said river, and also to set out, open, make and maintain" certain new cuts or canals thereinafter specified, to communicate with the river and to be used for the navigation, "and also to remove all obstructions and impediments whatsoever to the said navigation." The defendants were also by statute empowered to levy rates or tolls for the use of certain locks and artificial cuts, but were expressly forbidden to receive any toll in respect of such part of the navigation as was between Bow Creek and Old Ford Lock, which part of the navigation was an ancient highway, and was by statute declared to be for ever free from toll.

The plaintiffs' barge, while navigating a part of the river between Bow Creek and Old Ford Lock, struck upon one of several submerged piles and was injured. The plaintiffs having brought an action for damages, the jury found that the piles were dangerous; that the defendants ought to have been aware of the danger, and had neglected their duty:—

Held, by Pollock, B., that the action could not be maintained, since the defendants were unpaid trustees appointed for public purposes in aid of the common law right of navigating an ancient highway, and the duty of removing obstructions imposed by the statute was discretionary and not compulsory.

THE action was tried before Pollock, B., on the 6th of November, 1878, and heard, on further consideration, on the 4th of December, 1878, when the judgment was reserved.

The facts proved at the trial and the arguments appear from the judgment.

A. Charles, Q.C., Lumley Smith, and *Brooke Little,* for the plaintiffs.

J. Brown, Q.C., R. E. Webster, Q.C., and *St. Aubyn,* for the defendants.

Jan. 25. 1879. The following judgment was delivered by

POLLOCK, B. The plaintiffs in this action are the owners of the barge *Globe*. The defendants are the Lee Conservancy Board, who have been appointed by statute conservators of the River Lee and the cuts and works connected therewith. The

action is brought to recover damages for an injury which the plaintiffs' barge and its cargo received whilst navigating the River Lee in January, 1878, by reason of its striking upon a pile which projected above the bottom of the river, whereby the barge sank and its cargo was injured. The trial took place before me during the last sittings for Middlesex, when the jury found a verdict for the plaintiffs for the agreed amount of 582*l.* 14*s.*, and answered certain questions which I put to them with a view of determining, after argument, the legal rights of the parties.

From the evidence adduced at the trial for the plaintiffs and the defendants, it appeared that the place where the barge met with the injury is near to Five Bells Bridge, and a portion of the natural course of the River Lee between Bow Creek and Old Ford Lock, which is an ancient and navigable stream in respect of which the defendants, although they have rights given them by statute, cannot levy any toll from boats or barges using it, and of which they are neither owners nor occupiers. The pile against which the plaintiffs' barge struck had been placed in the bed of the river many years ago. The date of its being so fixed could not be ascertained, and its existence was unknown to the defendants or their agents until October, 1877, when Chamberlain, a lighterman, having to discharge a number of lighters at a wharf near to the pile, obtained the permission of the defendants' engineer to lower the water so as to see whether the bottom of the river was in a safe condition should barges take the ground. This accordingly was done, and the pile in question and several others were found projecting, and were cut level with the bottom by men employed by Chamberlain. After this several barges lay aground there in safety, but heavy floods having occurred the bottom of the river was scoured to a lower level, and the piles again projected. What was done in October, 1877, was known to the water bailiff and engineer of the defendants, but they considered that this part of the river bed was within the district of the Poplar Board of Works, and that the Poplar Board were bound to keep it in good order. No evidence was given which shewed whether this opinion was correct or otherwise.

At the close of the plaintiffs' case, counsel for the defendants submitted that no duty had been shewn to exist whereby the

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defendants were bound to remove the pile complained of. I thought the question so doubtful that the better course would be to hear the case for the defendants and then take the opinion of the jury upon any questions of fact which arose. Accordingly, after the defendants' witnesses had been examined, I summed up, reading to the jury the section of the statute upon which the alleged duty of the defendants was said to exist, to the language of which I will shortly call attention, and left to them the following questions, the answers to which are appended:—

1st. Assuming it was the duty of the defendants to remove all obstructions and impediments to the navigation, were the piles at the time of the accident dangerous? Answer, "Yes."

2nd. Were the piles so likely, before then, to become dangerous that the defendants ought to have been aware of the danger? Answer, "Yes."

3rd. Did the defendants neglect their duty? Answer, "Yes."

Upon these findings I reserved judgment until after argument of the questions of law; these were very fully and ably presented to me during the last sittings; the conclusion at which I have arrived is, that taking the facts as proved and the findings of the jury based upon them, the defendants are entitled to judgment.

The River Lee, which flows from the town of Hertford to the River Thames, is an ancient navigable river. Statutes have passed from time to time whereby powers have been given to trustees for preserving and improving the navigation; and by the Lee Conservancy Act, 1868 (1), s. 62, all the powers, authorities, and rights of the trustees are vested in the defendants.

The earliest statute which need be noticed for the purposes of the present case is the 7 Geo. 3, c. 51, which provides for the preserving and improving the navigation of the River Lee, and also for the making of new cuts, canals, and other works in connection therewith. Sect. 1 of that Act, after appointing as trustees a large body of gentlemen, including the Lord Mayor and Aldermen of the city of London, and the Mayor and Recorder of Hertford, contains a provision upon which the plaintiffs chiefly rested their case. It is as follows:—

"The said trustees, or any five or more of them, shall be, and

(1) 31 & 32 Vict. c. cliv.

they are hereby authorized and empowered from time to time, at their discretion, to cleanse, scour, deepen, enlarge, or straighten the channel or course of the said River Lee, and also to set out, open, make, and maintain, all or any of the new cuts or canals hereinafter specified and described to communicate with the said River Lee, and to be used for the said navigation; and also *to remove all obstructions and impediments whatsoever to the said navigation.*"

The plaintiffs contended that this provision gave a power to and imposed a duty upon the defendants to remove the pile which caused injury to their barge and her cargo. The defendants admitted that such a power was conferred upon them, but denied that any duty was imposed beyond the doing of that which, according to their discretion, they might from time to time deem necessary or proper.

Before I consider which of these two contentions is correct, it will be well to notice more closely what was the plaintiff's precise cause of action, and also what was the position of the defendants under the statutes. The plaintiffs complained not of any wrongful act or misfeasance committed by the defendants, but of a neglect of a supposed duty arising out of their position as conservators under the Act, and but for the intervention of the legislature it is clear that at common law had an obstruction or impediment to the navigation arisen at the place where the pile existed, those who navigated the river would have been without remedy, except against the parties who caused the obstruction. Looking next to the legislation affecting the matter, I find that by none of the many Acts which have been passed dealing with the navigation, is the bed of the river or any part of it vested in the trustees or the conservators, so that they are in no sense owners of the river or navigation, but are an unpaid body of trustees appointed for public purposes in aid of the common law right of navigating an ancient highway.

Further, by s. 69 of 7 Geo. 3, c. 51, the navigation is declared to be a free navigation, subject to the payment of certain rates which are provided for by s. 80, and all of which are referable to the user of the locks and artificial cuts where they are collected, and the Lee Conservancy Act 1850 (1), s. 45, expressly provides

(1) 13 & 14 Vict. c. cix.

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that the trustees shall not demand or receive any toll in respect of such part of the navigation as is between Bow Creek and Old Ford Lock, but the use of that part of the navigation is for ever, and notwithstanding any alteration or works to be made by the trustees of or in the same, to continue to be wholly free from all toll.

Under these circumstances, therefore, it becomes necessary to consider what is the true construction of s. 1 of the Act of Geo. 3. Are its provisions compulsory, or do they merely vest a discretion in the trustees? The words used are "authorized and empowered from time to time at their discretion," and this clearly governs all that follows, including the power to make and maintain all or any of the new cuts or canals which, according to all reason and authority (see *York and North Midland Ry. Co.* v. *Reg.* (1); *Great Western Ry. Co.* v. *Reg.* (2)), is clearly discretionary and not compulsory, and also the power "to remove all obstructions and impediments whatsoever to the said navigation." Unless some good reason for holding otherwise is shewn to exist, the language in itself would appear to create a discretionary and not a compulsory power, and at the close of the section the trustees are empowered "generally to do and perform all acts, matters, and things which the trustees, or any five or more of them, shall think necessary for the making, extending, improving, and maintaining the said navigation," implying as plainly as language can express a discretion.

Moreover, it should be noticed, in accordance with an undoubted rule of construction, that when the same statute imposes a duty on the trustees as to which no discretion is left to them, very different language is employed. Thus by s. 20, in order to secure the free navigation of the river during the progress of the works authorized by the Act, the trustees are "*required* to cause the said river to be kept navigable."

There is abundant authority to shew that when a statute gives an authority to do an act which the public interest demands, especially where judicial functions are created, words which would seem to give merely an option should be so construed as to confer a duty, but in the cases illustrating this principle the rule has been

(1) 1 E. & B. 858; 22 L. J. (Q.B.) 225. (2) 1 E. & B. 874.

acted upon only where the general object and intention of the Act are best supported by so holding. In the present case it may truly be said that one great object of the Act was to keep the navigation free from obstructions and impediments, but there still remains the question who are the persons who are to decide what is an obstruction or impediment, and when and in what manner and at what cost they are to be removed? Extreme cases may be put on either side. On the one hand it may be said, if a vessel were to sink in the river so as wholly to obstruct all navigation, are not these conservators bound to remove it, and should they fail to do so, are they not liable in damages to any one who, whilst using the navigation, suffers therefrom? On the other hand it may be asked what discretion can the conservators be properly said to possess if they are bound at all times, irrespective of other claims upon their funds, to remove at great cost that which first an individual barge owner, and afterwards a jury, may pronounce to be a dangerous obstruction? The fair result of what can be said upon both sides of the question appears to me to be this: that the legislature has, partly for the purpose of the construction of new cuts and partly for the purpose of maintaining the navigation of an ancient navigable river, created a body of trustees without giving them any property in the river, or right to levy tolls for the use of it, and has vested in this body large and important powers, including the power at their discretion to remove obstructions and impediments to the navigation, and that although the trustees would be responsible in damages to one injured by any misfeasance committed by them, or by any non-feasance where the duty imposed was imperative, they are not liable where the matter in respect of which the non-feasance is alleged is one which comes within the scope of their discretion, and as to which they are the persons whose express duty it is to say whether the act should or should not be done.

It might be said that in the present case it was not shewn by the defendants that they had ever exercised any discretion, or, indeed, taken the matter into their consideration. This point was not made by counsel, nor does the statement of claim raise it. (1)

(1) Paragraphs 5 and 6 of the claim were as follows: 5. The defendants were, under the Lee Conservancy Act, 1868, and sundry other Acts, bound to

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Were a statement of claim to allege that the attention of the defendants had been called to a dangerous obstruction, and they had declined to meet and consider as to its removal, it might disclose a good ground for a mandamus requiring the board to proceed, but in such a case it is difficult to see how the plaintiffs could recover any damages.

It was suggested by counsel for the plaintiffs, though not much pressed, that one mode of giving effect to the words "at their discretion" would be by holding them to refer, not to the removal or non-removal of an obstruction, but to the mode of removal. I cannot, however, find any ground for so cutting down what is the plain meaning of the words, and to do so would, in my judgment, be giving an artificial effect to them which cannot be justified. It would, moreover, suppose the legislature to have used the words without any need, for had they been omitted it is clear that the trustees are the only persons who could direct how any obstruction should be removed.

Several authorities were cited by the plaintiffs' counsel. The earliest in date was *Parnaby* v. *Lancaster Canal Company*. (1) The plaintiff in that case was the owner of a fly-boat, and brought his action against the defendants, who were owners of a canal, and by their Act were entitled to levy tolls upon boats navigating it, and had power to remove any boat obstructing the navigation. The plaintiff alleged that they had failed to remove a boat which had sunk and obstructed the navigation, whereby the plaintiff's boat struck against it, and was damaged. The plaintiff contended for the liability of the defendants upon two grounds, first, That they were liable by reason of the clause in their Act, by which they were empowered, and therefore it was argued, bound to remove the sunken boat; and secondly, That a duty attached to the defendants at common law to make good the navigation of the

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preserve and maintain the navigation of the River Lee, but they negligently, carelessly, and wilfully neglected to preserve and maintain the same, and negligently allowed the said piles to project into the bed of the river as aforesaid.

6. The defendants had notice before the said injury that the said piles were where they were, and were dangerous to the navigation, but they did not remove them nor warn the plaintiffs against them.

(1) 11 A. & E. 223.

canal, whilst they exacted tolls for their benefit. The Courts of Queen's Bench and Exchequer Chamber decided in favour of the plaintiff upon the latter ground, the Court of Queen's Bench saying that the case is not like that of public officers who derive no benefit: "The present defendants on the contrary invite the whole public to navigate on their canal in consideration of the tolls paid;" and further likening the case to that of a shopkeeper who leaves a trap-door open in his shop. The Court of Exchequer Chamber also say, "The facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company, and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." As to the first ground the decision was in favour of the defendants, the Court of Exchequer Chamber saying, "The principal objection in this case was, that the clause recited in the declaration and which is therein stated to have cast a duty on the company to remove the obstruction caused by the sunken boat, was not obligatory, but was an enabling or a permissive clause only. And we are all of that opinion. Neither the clause recited, nor anything in the Act of Parliament contained, imposes such a duty upon the defendants below, and the allegation in the declaration as to the duty of the company seems to have been founded on a mistake as to the true meaning and effect of that clause."

In *Mersey Docks Trustees* v. *Gibbs* (1), the House of Lords decided that the trustees were liable for negligently allowing a bank of mud to remain at the entrance of their dock, but in so holding the judgment was based upon the principle acted upon in *Parnaby* v. *Lancaster Canal Co.* (2), the Lord Chancellor (Lord Cranworth) saying that the only difference between that case and the one before the House was that in the latter the trustees did not collect tolls for their own profit, but merely as trustees for the benefit of the public, which did not, in his opinion, make any difference in principle in respect to their liability; and I find

(1) Law Rep. 1 H. L. 93. (2) 11 A. & E. 223.

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nothing, either in the opinions given by the noble and learned Lords who took part in that case, or in that of the judges who were called in, to shew that they disapproved of that portion of the judgment of the Court of Exchequer Chamber in *Parnaby* v. *Lancaster Canal Co.* (1), which negatived any liability of the defendants based upon the language of their Act.

The tendency of the opinion of the judges in *Mersey Docks Trustees* v. *Gibbs* (2) is no doubt to limit the effect of some of the decisions whereby trustees and commissioners of public works have been shielded from the result of their negligence, and there is great weight in the observation that "it is contrary to the general rule of law, not only in this country but in every other, to make a person judge in his own cause;" but to this is added, "though the legislature can, and no doubt in a proper case would, depart from that general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes." (3)

The position of the present defendants, who have no property or pecuniary interest in the old River Lee, and the language of their Act, are very different to those which existed in the case last cited. Moreover, it is to be noticed that in all the cases which are carefully collected and commented upon in the opinion of the judges, not only were the defendants persons incorporated for the express purpose of constructing and carrying out particular works essential to the expressed object of the legislature, but the injuries in respect of which damages were sought arose from an act of commission or omission connected with such works; whereas here, so far as the ancient course of the River Lee is concerned, it does not appear from the Act that any new works were to be executed, or that except in the discretion of the trustees anything whatever was to be done. In the more recent case of *Winch* v. *Conservators of the Thames* (4), in which the defendants were held liable for the non-repair of the towing-path adjoining the River Thames, the judgment proceeded upon the same principle as was acted upon in *Mersey Docks Trustees* v. *Gibbs* (2); the majority of the Court of Exchequer Chamber saying: "We think

(1) 11 A. & E. 223.
(2) Law Rep. 1 H. L. 93.
(3) Law Rep. 1 H. L. 110.
(4) Law Rep. 9 C. P. 378.

it is enough to support this verdict if the defendants were, so long as they kept the towing-path open and took toll for its use, under an obligation to those whom they invited to use it to take reasonable care to see that the towing-path was in such a state as not to expose those using it to undue danger." Before quitting the cases which bear upon this part of the case I ought to allude to *Hartnall* v. *Ryde Commissioners* (1), in which the defendants, who were improvement commissioners, were held liable for non-repair of a footway which was a highway; and *Ohrby* v. *Ryde Commissioners* (2), where the defendants were held liable for not properly fencing a footway. But on reference to these cases and the statutes upon which they are founded, it will be seen that in the first the defendants were substituted for the parish as to the repair of highways within their district, and by the neglect complained of had, according to the express provision of their Act, committed a misdemeanour. In the second the language of the Act, by which the defendants were constituted and their duties defined, was clearly imperative. On the other hand, in *Parsons* v. *St. Matthew, Bethnal Green* (3), where the words of the statute, under which it was sought to make the defendants liable, were, "it shall be lawful for every vestry to repair," the Court said this gave the defendants a discretion, and therefore they were not liable for non-repair of a highway. The case of *Re Newport Bridge* (4) is to the same effect.

Thus far I have been led both by principle and authority to the conclusion, that there is no such obligation laid upon the defendants by statute as makes them liable for the non-removal of the obstruction complained of, and in dealing with this part of the case it has, I think, been made also to appear that the position of the defendants is such that no common law liability can be inferred. But before I so hold, I would notice an argument which, were it well founded in fact, would certainly be entitled to great weight. It was said on behalf of the plaintiffs that although the particular place where the plaintiffs' barge was injured was a portion of the old River Lee, the navigation of which was expressly exempt from

(1) 4 B. & S. 361; 33 L. J. (Q.B.) 39.
(2) 5 B. & S. 743; 33 L. J. (Q.B.) 296.
(3) Law Rep. 3 C. P. 56.
(4) 2 E. & E. 377; 29 L. J. (M.C.) 52.

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toll, the statutes must be read together, and that their intention was to deal with the whole navigation as one entire subject-matter as to which the trustees must be treated as proprietors, and that although the right to take tolls is confined to the new cuts and locks, it is taken for the benefit of and to be expended upon the whole navigation, whether new or old. I have carefully considered the defendants' Acts with a view to see whether any true foundation for this argument exists, but so far from finding any it appears to me that an intention is clearly shewn throughout to preserve the legal status of the old River Lee, and the right of the public to navigate it intact; and this is only what would be expected where the legislature was dealing with an ancient highway navigable at all times and by all persons.

This contention must therefore fail. The conclusion at which I have arrived makes it unnecessary to enter upon the consideration of a question which was argued before me, and has been much discussed in many of the cases, namely, whether the funds of the defendants derived from their tolls are applicable to the satisfaction of damages in an action such as the present. The result of this conclusion is that, notwithstanding the findings of the jury, no legal cause of action has been established, and judgment must be entered for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Thomson, Son, & Brooks.*
Solicitor for defendants: *R. J. Pead.*

WEBSTER *v.* PETRE AND OTHERS.

1879
March 11.

Principal and Surety—Discharge of Surety—Subsequent Legislation affecting Indemnity—Effect on Liability of Surety—Abandonment of Railways Act, 1850 (13 & 14 *Vict. c.* 83), *s.* 31—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 31, 32.

The plaintiff gave a bond to the Crown conditioned to be void if a certain railway was completed within a given time, and the defendants undertook to indemnify the plaintiff against all liability which he might incur in giving such bond. The railway was not completed, and the plaintiff, under the Railway Companies Act, 1867, which was passed after the giving of the bond, applied to the Board of Trade to authorize the abandonment of the railway and to cancel the bond, which was ordered upon condition that the money secured by it should be applied as assets of the company. The company was accordingly wound up, and the plaintiff paid, under an order of the Court, a part of the money secured by the bond, which was then cancelled. The plaintiff brought an action to recover the amount so paid from the defendants on their undertaking to indemnify. On demurrer to the statement of claim:—

Held, that the payment made by the plaintiff to obtain the cancelling of the bond was a liability incurred by him in giving the bond, for which the defendants were liable to indemnify him, although the Railway Companies Act, 1867, enabling the plaintiff to take proceedings to cancel the bond was not passed when the indemnity was given.

DEMURRER to a statement of claim, the material parts of which were as follows:—

3. On the 30th of June, 1865, the plaintiff and the defendants and certain other persons, being mutually interested in the passing of a bill through Parliament authorizing the construction of the South Essex Railway, entered into an agreement by which the plaintiff, on the one hand, undertook, amongst other things, to pay a sum of 800*l.* towards the parliamentary expenses incurred in obtaining the Act, and immediately after the Act was obtained to give the necessary bond with sufficient sureties to the Treasury to release the parliamentary deposit; and the defendants, on the other hand, together with certain other persons mentioned in the schedule to the agreement, jointly and severally undertook to indemnify the plaintiff and his sureties against all liability which he or they might incur in giving the said bond to the Treasury to the extent of 10,000*l.*

4. The plaintiff did accordingly pay the sum of 800*l.*; and

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on the 20th of July, 1865, he and one Frederick Doulton as his surety entered into the agreed bond, by which they became bound to her Majesty the Queen in the penal sum of 40,000*l.* The bond was conditioned to be void if the South Essex Railway Company should, within the time limited for the completion of the railway, either open the railway for the public conveyance of passengers, or prove to the satisfaction of the Lords of the Committee of her Majesty's Privy Council for Trade and Foreign Plantations, that the company had paid up one-half of the amount of capital by the South Essex Railway Act authorized to be raised by means of shares, and had expended for the purpose of the Act a sum equal in amount to such one-half of the capital, or should pay to her Majesty, or her heirs or successors, the full sum of 20,000*l.*

5. None of the conditions of the bond were ever fulfilled, and on the 31st of December, 1873, the time limited for the completion of the railway having long previously expired, the plaintiff being liable under the bond, and being prevented from disposing of his property by reason of such liability, applied, in pursuance of the Abandonment of Railways Act, 1850, and the Railway Companies Act, 1867, to the Board of Trade to issue their warrant authorizing the abandonment of the railway, and to cancel the bond.

6. On the 9th of May, 1874, the Board of Trade granted the application, but upon condition that the money secured by the bond should be applied as part of the assets of the company.

7. On the 3rd of July, 1874, the company was ordered to be wound up by the Court of Chancery under the provisions of the Abandonment of Railways Act, 1869; and on the 3rd of November, 1875, upon the application of the official liquidator of the company, the plaintiff was ordered to pay into court the sum of 750*l.* (which was estimated as a sufficient sum) as assets of the company, and liberty was given to the official liquidator of the company, upon payment being made of such sum and upon the plaintiff undertaking to make good any further sum that might be required, to apply to the Treasury to have the bond assigned to him to be cancelled. In pursuance of this order the plaintiff, on the 14th of December, 1875, paid the sum of 750*l.* into court, and gave the undertaking, and the bond was afterwards cancelled.

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8. On the 18th of March, 1878, upon the application of the plaintiff, it was ordered by the Court that a sum of 258*l.* 4*s.* 5*d.*, less certain costs of the official liquidator, should be paid out to the plaintiff as the part remaining and not required as assets of the company of the sum of 750*l.*; and the plaintiff afterwards, on the 21st day of May, 1878, received under this order the sum of 233*l.* 8*s.* 3*d.* The plaintiff thus had to pay, in consequence of his liability under the bond the sum of 516*l.* 11*s.* 9*d.*, and lost the interest thereon at 5 per cent. from the 14th of December, 1875, to the 21st of May, 1878, amounting to 91*l.* 4*s.* 7*d.*

The plaintiff claimed 607*l.* 16*s.* 4*d.*, and interest thereon from the 21st of May until judgment.

One of the defendants, George William Hemans, demurred to the whole of the statement of claim, on the ground that the arrangement entered into between the plaintiff and the Board of Trade, referred to in the 5th and 6th paragraphs of the statement of claim, constituted a material variation in the risk against which he agreed to indemnify the plaintiff, and that it did not appear that the arrangement was entered into with his knowledge or consent.

Joinder in demurrer.

Gainsford Bruce (*F. Radcliffe*, with him), for the defendant. This is a contract to indemnify the plaintiff on the bond that has not been enforced, and the plaintiff has incurred no loss under the bond. What was paid was in pursuance of a voluntary arrangement outside the bond. Further, the Act under which the arrangement was made was passed after the bond was given. The Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), s. 31, only gave power to a shareholder to petition for the winding-up of the company. The Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 32 (1), gave power to make the application that was made in this case, and s. 31 enables the Board of Trade to make it a condition that the money deposited shall be applied as part of the assets of the company. But this Act was passed after the bond was given, and there is therefore nothing to take the case out of the ordinary rule of law that a surety's position cannot

(1) Amended by the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114).

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be altered without his consent, no matter whether the new liability is less or more onerous: *Holme* v. *Brunskill.* (1)

Webster, Q.C. (*Bray* with him), for the plaintiff. The defendant undertook to indemnify the plaintiff against all liability which he might incur in giving the bond to the Treasury, and the appropriation of part of the money as assets of the company in the winding-up is such a liability. The defendant has not pleaded that the steps taken by the plaintiff were improper, but relies on there being no cause of action. The parties, however, are bound by legislation subsequent to their agreement. The Railway Companies Act, 1867, was a remedial Act, as before it there was no mode of getting rid of the liability on the bond. If a third person, a creditor for instance, had applied, the plaintiff would have been bound by the order of the Board of Trade, and it cannot make any difference that he himself has taken advantage of the provisions of the Act. In either case the liability has been incurred in giving the bond, and the plaintiff is entitled to recover on the indemnity. [He cited *Smith* v. *Howell* (2), *Warwick* v. *Richardson* (3), *Ranelaugh* v. *Hayes* (4), *Broughton's Case* (5), and *Wooldridge* v. *Norris.* (6)]

Gainsford Bruce, in reply. In the cases cited there was a primary liability, and not as here a liability as surety only. The distinction is clearly expressed in *Pitt* v. *Purssord.* (7) The question here is whether the defendant's position as surety has been altered without his consent. [He also cited *Parker* v. *Lewis* (8), and *Warre* v. *Calvert.* (9)]

POLLOCK, B. This is a case not without difficulty, in part by reason of the novel character of the circumstances under which the cause of action is alleged to have arisen—circumstances that could not have occurred but for the passing of the Railway Companies Act of 1867. Upon the part of the defendant it is said that the plaintiff had no right to make the payment with which he seeks to charge the defendant in this action.

(1) 3 Q. B. D. 495.
(2) 6 Ex. 730.
(3) 10 M. & W. 284.
(4) 1 Vern. 189.
(5) 3 Co. Rep. pt. 5, 23 b.
(6) Law Rep. 6 Eq. 410.
(7) 8 M. & W. 538.
(8) Law Rep. 8 Ch. 1035.
(9) 7 A. & E. 143.

In the solution of this case I think I must look at the substance of the defendant's undertaking on the indemnity; no doubt Mr. Bruce is perfectly right in saying, if I am to treat this which occurred and which led to the payment of this sum of money as an alteration or variation of that liability which the defendant originally came under by reason of the contract declared upon, then, there having been no consent by the defendant, there not having been even any notice of the steps that were being taken, the defendant was discharged, and cannot be made liable for that which the plaintiff has done; and for that the recent case in the Court of Appeal of *Holme* v. *Brunskill* (1) is an amply sufficient authority. Let us see, however, what is the real effect of this undertaking, and what followed upon it. The undertaking stated is: "That the defendants jointly and severally undertake to indemnify the plaintiff and his sureties against all liability which he or they might incur in giving the said bond to the Treasury to the extent of 10,000*l*." It is not an undertaking to indemnify the plaintiff against any amount which he may be called upon to pay to the Treasury, it is an indemnity of a wider kind, because apt and proper language could easily have been used to express the former; but what is expressed is this, "all liability which he or they might incur." It is quite true that any liability for which the plaintiff seeks to make the defendant liable must come fairly and substantially within these words, but if it does, any objection that the course pursued by the plaintiff was not the proper course, but one open to objection as prejudicial to the interests of the defendants, should come by way of answer and should be averred in the statement of defence. Those being the words of the indemnity, let us see what happened. None of the conditions of the plaintiff's bond to the Treasury were ever fulfilled, and as the time limited for the completion of the railway expired, it is quite clear that the plaintiff was bound and liable to pay the sum in the bond; and had he paid it the defendants would have been liable to indemnify him. Further, it is not a matter to be lost sight of that the plaintiff was prevented from dealing with his property by reason of such liability, because this, being a bond to the Crown and not a mere bond to the subject, was

(1) 3 Q. B. D. 495.

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binding on his lands. That being so, the money being due, what is it that the plaintiff does? He avails himself of the means that are given by this statute, the Railway Companies Act, 1867, to do what? Not, in my opinion, to alter or vary his liability as if he had shifted it to some other form of liability or had come under some fresh liability which would have been different from that which the defendant undertook; but he does that which enables him to determine this question as to the payment of this sum of money. It is as if a man having a bond to pay, and being liable to pay 1000*l.*, had been told, "If you will appear upon a particular day and pay the sum of 100*l.* instead of 1000*l.* at the Bank of England, you shall be free." If that were done, I should say it was not creating a new obligation, but rather availing himself of the means of getting rid of his liability, in the same way as a man does who goes through the Bankruptcy Court instead of paying his creditors 20*s.* in the pound. Reverting to the words of the indemnity, "against all liability which he or they might incur in giving the said bond to the Treasury," it seems to me that the payment made by the plaintiff may fairly be said to have been a liability incurred in giving the bond. If there are any facts which shew that this is not so, they must come from the defendants by way of statement of defence.

Judgment for the plaintiff.

Solicitors for plaintiff: *Hargrove & Co.*
Solicitors for defendant: *Radcliffe & Co.*

BOUCH *v.* THE SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY COMPANY.

1879
March 17.

Attachment of Debts—Garnishee—Common Law Procedure Act, 1854, *s.* 61—*Interest on Railway Stock guaranteed by Garnishee.*

The defendants raised money by the issue of capital stock to complete a portion of their line. By an arrangement between the defendants and the D. Railway Company, confirmed by an Act of Parliament, the line was worked by the latter company, who provided and paid to the defendants half-yearly a sum of money for the payment of interest on the stock. Judgment having been recovered by the plaintiff against the defendants and one of the half-yearly instalments being due:

Held, that it could be attached in the hands of the D. Railway Company as a debt under the Common Law Procedure Act, 1854, s. 61.

SPECIAL CASE.

The plaintiff having obtained judgment against the defendants (hereinafter called the Sevenoaks Company), applied at chambers for an order to attach all debts due to the defendants from the London, Chatham, and Dover Railway Company (hereinafter called the Dover Company). On the hearing, the Dover Company attended and admitted that they held a sum of 4750*l.*, payable under the terms of arrangement hereinafter mentioned, and professed themselves to be willing to abide the order of the Court; but the Sevenoaks Company and certain of their stockholders, represented by George Herbert Pember, also appeared, and claimed that the amount so held by the Dover Company could not be attached to answer the judgment debt. An order was made that a special case should be stated between the judgment creditor on the one hand as plaintiff, and the Sevenoaks Company and George Herbert Pember, on behalf of himself and others, the stockholders, on the other hand as defendants. A case was accordingly stated, which, so far as is material, was as follows.

1. On the 3rd of June, 1872, the Sevenoaks Company entered into an arrangement under seal with the Dover Company for the purpose of providing for the construction of a line of railway from Otford to Maidstone, in the county of Kent, forming a separate section of the undertaking of the Sevenoaks Company, and called

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the Maidstone Extension, which the Sevenoaks Company had been previously authorized to construct but had not constructed.

2. The deed of arrangement after providing that the Sevenoaks Company should forthwith construct and complete the line, that the Dover Company should work it when completed, and that the Sevenoaks Company should from time to time issue such an amount not exceeding 200,000*l.* of a certain authorized capital of 300,000*l.* as should be requisite for the construction of the line and for other specified purposes, provided further by clauses 4, 5, 6, 7, and 9, as follows:

"4. The Dover Company shall provide and, if need be, annually pay the sum of 9000*l.* for the payment of interest on the stock issued by the Sevenoaks Company in accordance with these terms, and such sum of 9000*l.* shall be payable and be paid from the day on which the Maidstone line shall be completed as aforesaid.

"5. The sum provided for by the last preceding clause to be from time to time provided and paid by the Dover Company (in these terms called the 'contribution of the Dover Company,') shall be deemed to become payable from day to day, but shall be paid at the same time as the interest on the Dover Company's Arbitration Debenture Stock is paid.

"6. The contribution of the Dover Company shall be a charge on the undertaking of the Dover Company next after the interest on their existing debenture stocks.

"7. The contribution of the Dover Company shall be repaid to them out of the net earnings of the Maidstone line, and any deficiency in that behalf of those earnings in any year, shall be a charge on the net earnings of that line in every subsequent year until the same is fully paid.

"9. The gross earnings of the Maidstone Line shall be applicable and applied in the manner and with the priorities following, and not otherwise:—

"(1.) In payment to or retention by the Dover Company, of the actual cost of working the same as hereinbefore provided.

"(2.) In repayment to or retention by the Dover Company, of their contribution, and of any sum or sums which may for

the time being be due to them under Article 7 of these terms.

"(3.) In payment of the residue then remaining to the Sevenoaks Company for their own benefit."

3. The arrangement was confirmed by an Act passed in the same year called "The Sevenoaks, Maidstone, and Tunbridge Railway Act, 1872," in the following terms:—

"The terms of arrangement set forth in the schedule to this Act are hereby confirmed, and the same shall be in all respects as fully as if the same were set forth at length and enacted in the body of this Act, binding on the company and their stockholders, and on the Dover Company, their debenture stockholders, creditors, preference stockholders, and ordinary stockholders, and shall be carried into effect."

4. The Act also contained in its 21st section, provisions for the realisation and distribution of the assets of the Sevenoaks Company in the event of its being wound up on the transfer (which was authorized by the Act) of its undertaking to the Dover Company, and enacted that subject to the payment or satisfaction of all their debts and liabilities, the company should pay and distribute its assets among its registered shareholders.

5. The 23rd and 24th sections provided that after the debts, liabilities, and engagements of the company, should be paid, satisfied, or discharged, and their net moneys distributed, the company should be dissolved, but that everything done before the dissolution should be as valid as if the dissolution had not happened, and should not be prejudiced or affected thereby.

6. The terms of arrangement were modified by the Sevenoaks, Maidstone, and Tunbridge Railway Act, 1873, to this extent that the sum of 200,000*l.*, hereinbefore referred to was increased to 211,000*l.*, and the sum of 9000*l.* was increased to 9500*l.*

7. Either party had liberty to refer to the Act of 1872, and to the terms of arrangement, and also to refer to the Act of 1873, and the Acts therein recited, and to 38 & 39 Vict. c. cciii., as if the same were incorporated in the case.

8. The deed of arrangement as so modified was carried into effect, and the Sevenoaks Company issued the prospectus herein-

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after (so far as is material) set out, inviting subscriptions to the stock to the amount of 200,000*l.* :—

"Sevenoaks, Maidstone, and Tunbridge Railway Company,
"Extension from Otford to Maidstone,
"Part of working system of
"London, Chatham, and Dover Railway Company,
"Issue of 200,000*l.* stock.

"Guaranteed 4*l.* 10*s.* per cent. by London, Chatham, and Dover Railway Company, from the completion of the line, and entitled to 1*l.* 10*s.* per cent. additional interest from profits of line.

"The capital now to be raised under the Act of last session and the agreement with the London, Chatham, and Dover Company, confirmed by that Act, will be entitled in perpetuity to the payment of 4*l.* 10*s.* per cent. per annum by the London, Chatham, and Dover Company from the completion of the line. This guarantee which is absolute, and not dependent on the profits of the line itself, will rank after the arbitration and B debenture stocks of the London, Chatham, and Dover Company, not exceeding in the whole 5,999,000*l.*, and before its preference, capital and ordinary stock.

"This guarantee is therefore certain, and when payable on the completion of the line, the stock will yield 4*l.* 10*s.* per cent. for the payment of which an estimated gross receipt of 34*l.* per mile per week will suffice.

"The additional interest of 1*l.* 10*s.* per cent. has been attached to the stock by the Sevenoaks, Maidstone, and Tunbridge Railway Company, under the Act of last session, and will be payable out of the net earnings of the line, after payment and recoupment to the London, Chatham, and Dover Company, of working expenses, and the amount of the guaranteed interest paid by them.

"The guarantee as authorized last session is limited to 9000*l.*, or 4*l.* 10*s.* per cent. on a sum of 200,000*l.* In consequence, however, of the great increase in the price of material and cost of labour since the original estimate was made, the directors of the London, Chatham, and Dover Company, have by resolution agreed (subject to Parliamentary sanction and to the approval of their proprietors) to extend the guarantee for the completion of the

line by an additional 500*l.* per annum, so as to cover the sum of 211,000*l.*, and a Bill is now before Parliament for this purpose.

"The 200,000*l.* capital now to be raised will therefore be part of a sum of 211,000*l.*

"The money raised will be solely applicable to the completion of the line under the provisions of the Act of 1872."

The Dover Company caused to be published and circulated with the above prospectus a letter recommending the proposed issue of stock to the favourable consideration of their proprietors.

The stock and also the additional 11,000*l.* of stock were subscribed for and allotted on the terms set forth in the prospectus.

9. The stockholders are registered members of the Sevenoaks Company, having like qualifications and rights of voting with other members.

10. Ever since the completion of the line the Dover Company have, in execution of the deed of arrangement, every half year, viz. on the 15th of January and the 15th of July each year, paid to the Sevenoaks Company the sum of 4750*l.*, being half the sum of 9500*l.*; such payment has been made out of the profits of the Dover Company next after the interest on their debenture stock, by cheque payable to the Sevenoaks, Maidstone, and Tunbridge Railway Company, or order.

The Sevenoaks Company, upon receipt thereof, have, after indorsing the same, paid it into an account at their bankers opened in the names of two directors of the Sevenoaks Company, by whom the same has been transferred to another wholly separate and distinct account at the bankers entitled the "Interest Warrant Account," from which the interest warrants were paid by the bankers to the stockholders in respect of the stock.

11. On the 16th of July, 1878, when the garnishee order was served, one of the half-yearly payments of 4750*l.* was due and payable by the Dover Company to the Sevenoaks Company (viz. on the 15th of July, 1878), and a cheque had actually (viz. on the 10th day of July, 1878) been drawn and signed ready to be paid to the Sevenoaks Company, but it had not been handed to them. In consequence of these proceedings and the orders herein this cheque was afterwards cancelled.

12. According to the accounts as rendered by the Dover

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Company there had never been any surplus earnings payable by the Dover Company to the Sevenoaks Company, or to the stockholders over and above the annual sum of 9500*l.* The earnings in respect of the Maidstone extension, after providing for the working expenses for the half year ending the 30th of June, 1878, according to the accounts, amounted to 230*l.* 5*s.* 10*d.*; and the whole earnings, after providing for working expenses, since the opening of the line in June, 1874, to 2624*l.* 10*s.* 9*d.*

The question for the opinion of the Court was whether the sum of 4750*l.*, or any part thereof, was on the 16th of July, 1878, liable to be attached by the judgment creditor to answer the judgment debt?

Webster, Q.C. (*Bray* with him), for the plaintiff. The Act sanctions an arrangement between the two railway companies, and as between the preference and other shareholders of the Sevenoaks Company it is binding, but it does not create debenture holders or mortgagees, and does not, therefore, affect the rights of creditors. [He referred to *In re Stuart's Trusts.* (1)]

Herschell, Q.C. (*Jeune*, with him), for the defendants and other parties interested. These shareholders subscribed for this stock on the footing that the dividends should not depend on the earnings of the Sevenoaks Company, but on the credit of the Dover Company. The latter might have paid the dividend direct to the holders of the stock, but they pay it to the Sevenoaks Company for convenience of distribution, and a trust attaches to it under the Act of Parliament in the hands of the Sevenoaks Company, and it cannot be attached.

Webster, Q.C., in reply.

KELLY, C.B. This case is by no means free from difficulty, but I have come to the conclusion that this money is attachable by the judgment creditor.

When we look not merely to the terms of the Act of Parliament, but to the whole case, nothing can be more clear than that this money is payable, in the first instance, to the Sevenoaks Company, and they, on receiving it, indorse the cheque or order

(1) 4 Ch. D. 213.

for the payment of the money, and pay it into their bankers to the use of the holders of this stock. But before they can thus dispose of it, and before the payment into any bankers, or into the hands of any person or persons, to the use of the stockholders, they must themselves have the money.

Now, if the transaction takes place in this way that the Dover Company or their agent, or some officer of their company, comes and lays the money in bank notes upon a table in the office of the Sevenoaks Company, if nothing more occurs the Sevenoaks Company will pay it over to the holders of this stock. But before that takes place, and while the money is lying upon their table, what is there upon the agreement or the Act of Parliament which is before us to deprive a creditor of the right to come and take in execution the very bank notes which are lying upon his debtor's table? If so, he has equally the right, if the money be about to be paid over, but has not yet been paid over, to an execution under his judgment, and to claim the money by attachment, and consequently I am of opinion that this attachment should succeed.

Now, as to the arguments which have been urged for the defendants, that this money is impressed either with a trust or with a duty. It may be it is not a trust, and does not amount to a trust, but merely to a duty to pay it over according to the arrangement between the parties, but I cannot agree that the duty which is imposed upon the Sevenoaks Company to apply the money in question to a particular purpose, when we look to what that purpose is, should prevail over and supersede the right of the creditors, and compel the payment of the money over to the stockholders. There is a clear distinction in the legal rights of debenture holders and preference shareholders, and to hold that this money could not be attached, would be to hold that the two are in exactly the same position. It may be there is a duty here or that there is what may be called a security, it may also be called a direct order so to apply the whole of the money which the Dover Company pay over to the Sevenoaks Company, but a direction to do this cannot prevail against creditors who are no parties to any such arrangement.

I think, therefore, the right of the creditor must prevail, and that he can attach this money, and although the preference stock-

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holders will, for a time be deprived of a portion of the money to which they are entitled, they are only in the condition of any ordinary preference shareholders in any railway company where there are debenture holders. The debenture holders must be paid first before anything else, for they have a charge upon the company and the company's property; but before the preference shareholders can defeat the claim of the creditors, there must be some express charge or assignment of the trust of the property in question which those preference shareholders are to receive. Here there is really nothing more than a guarantee and an agreement for the benefit of these preference stockholders that, in addition to the preference which they possess under the constitution of the railway company and the Acts of Parliament, they have the security of this undertaking on the part of the Dover Company to provide the Sevenoaks Company with the means of paying their preference stockholders the interest to which they are entitled. It is a cumulative remedy, a cumulative right which they possess, but I do not think that it can possibly prevail against creditors.

Under these circumstances our judgment must be in favour of the plaintiff.

HUDDLESTON, B. What we have to consider is this—whether in the hands of the Dover Company there is a sum of money due to the Sevenoaks Company which the plaintiff, as a judgment creditor, has the right to attach.

The Sevenoaks Company wanted to make the Maidstone line and for that purpose they entered into an arrangement with the London, Chatham, and Dover Company, and on the faith of that arrangement they issued this prospectus. The arrangement, ratified by Act of Parliament, was made, as appears by the first paragraph of the case, between the Sevenoaks Company and the Dover Company. Those were the two parties to the arrangement and no other persons, and under it the Dover Company were bound to provide and if need be annually pay the sum of 9500*l*. Now I stop for the moment and ask to whom were they to pay that? I apprehend it must be clear that they were to pay that to the Sevenoaks Company. They were to do this for the payment of interest on the stocks which were issued or were to be issued at

that time by the Sevenoaks Company in accordance with the arrangement. The public were to subscribe that sum of money on the security of the London, Chatham, and Dover Company, and it was pointed out to the public that it was a most advantageous investment, because the Dover Company undertook to pay half-yearly the sum of 4750*l.* in respect of the interest.

What is the position of those persons who have thus advanced their money? Mr. Herschell says first, they are in the position of cestuis que trust, and then he seemed to argue that they are persons who are entitled to have the money paid to them direct by the Dover Company. Their position certainly is not that of debenture holders. Mr. Herschell was bound to admit that they were preference stockholders. A preference stockholder is nothing more than a stockholder who is entitled to his dividend before any one else, and that was exactly their position. It is said that they are persons who are entitled to be paid their moneys as against a judgment creditor of the company. I must say I cannot assent to that proposition. They are shareholders or parties in a concern, taking, no doubt, priority over others, but still they are shareholders, and they are liable for the debts of the concern. Mr. Herschell says there is no debt at all that could be attached here. The answer to that is that the money is due upon the contract between the Dover Company and the Sevenoaks Company; and if the money is due from the Dover Company to the Sevenoaks Company by the agreement, and according to the course of practice applicable, an action might be brought. I cannot doubt, therefore, that the debt is due, and under these circumstances I agree with my Lord that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Solicitors for plaintiff: *Hargrove & Co.*
Solicitors for defendants: *Newman, Stretton, & Hilliard.*

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March 21.

GREGSON, Appellant; POTTER and Others, Respondents.

Tolls—Pier Company—Notice of Rate authorized to be taken—Power to vary Tolls.

A pier company were authorized by Act of Parliament to charge, for goods laden or unladen on the pier, the rates specified in a schedule to the Act, but they could only demand them so long as "the rates for the time being authorized to be taken as thereinbefore mentioned" were painted on a board affixed to the premises. By a subsequent section power was given to lower the tolls or to raise them to such sums as the company should think proper, not exceeding the sums authorized by the Act. The company lowered some of the rates, but put up a board shewing the tolls contained in the schedule to the Act:—

Held, that the Act required the actual tolls in force for the time being, and not the maximum tolls authorized by the Act to be painted on the board.

Case stated by justices.

At a petty sessions holden at Rochford, in the county of Essex, an information was preferred by the appellant, the clerk to the Southend Local Board, against the respondents, Ephraim Potter, George Hume, and George West, charging them with unlawfully resisting one William Joseph Chignell, a person employed in the due execution of an Act, 10 Geo. 4, c. xlix., entitled "An Act for making and maintaining a Pier at or near Southend in the parish of Prittlewell in the county of Essex, and for making convenient approaches to and from the same."

By this Act a company called "The Southend Pier Company" was formed for making and maintaining a pier or piers at Southend, and for other the purposes of the Act. And by s. 85 it is enacted:

"That from and after the time that the said piers or jetties, or either of them, shall be so far formed and completed that ships or vessels may be enabled to lade or unlade at or from the same respectively (such pier or jetty being not less than one hundred and fifty feet in length, and containing a surface of seven thousand five hundred square feet), every master of every ship, vessel, boat, or other craft who shall lade or unlade any goods, wares, or merchandize, shall pay to the said company the several rates or duties mentioned in the first schedule hereunto annexed, set down in figures against the same respectively." The first schedule

contains (inter alia) the following item: "For every thousand bricks 2*s*."

Sect. 95 enacts: "That the said company shall from time to time cause to be painted on boards and affixed and stuck up and continued and renewed as often as the same shall be obliterated or defaced, upon a conspicuous place or conspicuous places in or near the said proposed pier or piers, jetty or jetties, causeway or causeways, in large and legible characters, a list of the several rates or duties for the time being authorized to be taken as hereinbefore is mentioned in respect of the said proposed pier or piers, jetty or jetties, and causeway or causeways. And it shall not be lawful for the said company to demand or take, or cause to be demanded or taken, any of the rates or duties hereinbefore authorized to be taken in respect of the said proposed pier or piers, jetty or jetties, causeway or causeways, but during such time as the board so painted as aforesaid shall remain fixed as aforesaid."

Sect. 96 enacts: "That it shall and may be lawful for the treasurer, collector, or collectors, or any other person or persons authorized and deputed by the said company to go on board any ship or other vessel, to demand, collect, and receive the said duties and rates by this Act due and payable, and for non-payment to take and distrain every such ship or vessel, and all her tackle, apparel, and furniture thereunto belonging, or any part thereof, and the same to detain and keep until he or they be satisfied and paid the said rates and duties."

Sect. 130 enacts: "That the said company shall have full power from time to time at any annual or special general meeting to lower or reduce all or any of the tolls and duties hereby granted, but no reduction of any such tolls shall be made unless a majority of the proprietors present at such general meeting as hereinbefore directed shall assent thereto, and it shall be lawful for the said company in like manner again to raise the said tolls to such sum or sums as they shall think proper, not exceeding the sums hereby authorized to be taken."

Sect. 126 enacts: "That in case any person or persons shall resist or make forcible opposition against any person or persons employed in the due execution of this Act, every such person

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shall for every such offence forfeit and pay any sum not exceeding 5*l.*"

By s. 3 of the Southend Local Board Act, 1875, 38 & 39 Vict. c. xxix., the local board of Southend were empowered to purchase the pier and undertaking formerly of the Southend Pier Company, and by s. 4 of the same Act it was enacted that, "On and from completion of the purchase the local board shall have and may exercise all the rights and powers formerly of the Southend Pier Company, except such of them as relate to that company's constitution or share or loan capital, and whatever might have been done by that company at a meeting general or special, or by their committee of management, may be done by the local board in their ordinary course of proceeding."

At the hearing of the information the following facts were admitted or proved:—

1. That the pier had been constructed, and was of the dimensions required by the Pier Company's Act, and that the purchase thereof by the Southend Local Board had been completed in the year 1875.

2. That a board with a table of rates or duties corresponding with the first schedule to the Pier Company's Act had been placed, and at the date of the alleged offence remained, affixed near the pier, and that in such table the rate or duty on bricks was stated to be 2*s.* per 1000.

3. That since the erection of the board the rate or duty on bricks had been several times altered under the authority of s. 130 of the company's Act, being at one time 1*l.* per barge load; afterwards 9*d.* per 1000; and ultimately, by a resolution of the local board duly passed shortly prior to the date of the offence charged in the information, raised to 1*s.* per 1000.

4. That no board painted with such altered rates or duties had ever been affixed pursuant to s. 95 of the company's Act, and no public notice by placard or otherwise was given of the raising of the rate or duty on bricks from 9*d.* to 1*s.* per 1000, but the before-mentioned board painted with the original rate or duty of 2*s.* per 1000, still remained affixed near the pier and was the only board purporting to contain any notice of the rates or duties payable under the Act.

5. That on the 8th of August last, two barges were loaded at the pier (within the limits of the Act) with bricks from a brick-field of which the respondent Potter was foreman.

That William Joseph Chignell, the duly appointed officer of the local board, demanded duty at the rate of 1*s.* per 1000, which the master of the vessels by Potter's direction, refused to pay, and tendered 9*d.* per 1000. That Chignell refused the sum tendered, and after reading to the respondents the section of the Act relating to obstruction of officers proceeded to distrain for the sum demanded, when the respondents Potter and Hume, with others acting under Potter's orders, forcibly resisted and prevented the levy, but it did not appear that any more force was used than was necessary to prevent the seizure. There was no evidence that West took any part in the transaction, nor even that he was present.

On these facts it was contended by the solicitor for the respondents, that the local board had not conformed to the provisions of the 95th section of the Pier Company's Act, inasmuch as they had not from time to time caused to be painted on boards and affixed near the pier a list of the rates and duties for the time being authorized to be taken, and that as Chignell was not acting in the due execution of the Act, in demanding and endeavouring to distrain for the altered rate or duty, the respondents were not guilty of forcibly resisting a person employed in the due execution of the Act. The justices dismissed the information against all the respondents.

The questions for the opinion of the Court were:

1. Was the maintenance of the board on which was painted a list of the rates or duties originally authorized by the company's Act, without any notice of the alterations from time to time made being affixed, a sufficient compliance with s. 95 of the company's Act?

2. Was the officer of the board in demanding and attempting to levy the altered rate or duty under the circumstances stated, employed in the due execution of the Act, and entitled to the protection of the 126th section?

Henry Matthews, Q.C. (*Edward Pollock*, with him), for the

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appellant. The authorized rate or duty is that mentioned in the Act, and that must be what is referred to under the words of the 95th section "hereinbefore authorized to be taken." If this is not so any variation of rate in respect of one article would altogether deprive the company of the right to levy tolls until the notice was altered. Sect. 130 speaks of the sums authorized to be taken when referring to the maximum tolls set out in the schedule. [He also referred to the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), ss. 93, 95].

Prentice, Q.C. (*Channell*, with him), for the respondents, was not called on.

KELLY, C.B. The case before us has been very strenuously argued by Mr. Matthews, but he has not been able, in my opinion, to raise a reasonable, far less a substantial, doubt about the construction of this Act. The 85th section gives to the company "the several rates or duties mentioned in the first schedule hereunto annexed." If the Act of Parliament stopped there, there could be no doubt about the construction, and the public or persons loading or unloading goods at this place would pay for goods at the rate of toll appearing in the schedule; but on referring to the 95th section we find: "The said company shall from time to time cause to be painted on boards, and affixed and stuck up, and continued and renewed so often as the same shall be obliterated or defaced, upon a conspicuous place or conspicuous places in or near the said proposed pier or piers, jetty or jetties, and causeway or causeways, a list of the several rates and duties for the time being authorized to be taken as hereinbefore is mentioned." Looking at the introduction of the words, "for the time being," if the rates vary, and upon the board there is specified the maximum rate only, it is clear that that cannot be the kind of board intended to be set up, since the maximum sum mentioned in the schedule never varies. The board is put up for the persons interested in seeing and knowing what the charge for the time being really is which they are by law bound to pay, and which alone the company by law are entitled to demand, and it is that sum which is to be put on such board. If it expressed only what was in the schedule it would express the maximum, but it would not tell either the

officers of the company, who have to make the demand, nor those of whom the demand is made, what is the exact amount payable. It is competent to the company to vary the amount to be charged, and no other construction can be placed on the words, "the several rates and duties for the time being authorized to be taken," except that "for the time being" means at the time when the demand is made, and when the demand must be satisfied. The board was, therefore, not in compliance with the Act of Parliament, and the company were not entitled to demand anything. Under these circumstances the magistrates were quite right in dismissing the charge.

HAWKINS, J. I am of the same opinion. I have no doubt that the object and intention of the legislature was to make it imperative upon the company, as a condition precedent to their right to take any toll whatever, that they should fix a board upon the pier which should afford all those persons using it information as to the extent of the liability they were under. Of course, the question is, whether or not the legislature have in this Act of Parliament before us used language to carry out that intention, and I am of opinion that they have. The 85th section ought to be read in conjunction with the 130th, so that when the tolls have once been lowered in the manner provided by the 130th section, the company are not authorized to take, and the master of the vessel using the pier is not liable to pay, the maximum amount of toll, but is only liable to pay, and the company is only authorized to take the reduced amount of toll. The 95th section requires that a list of the several rates and duties "for the time being authorized to be taken as hereinbefore mentioned," shall be placed on the pier. Mr. Matthews says that the words, "as hereinbefore mentioned," must refer to the maximum amount of tolls, namely, in the case before us 2*s.* per 1000 in respect of bricks. I think that full weight may be given to these words, while at the same time we give effect to the words "for the time being," by construing the latter words in the way I have suggested, and the words "as hereinbefore mentioned," as referring to the authority conferred in s. 85. The 85th section authorizes to be taken—not at all times the maximum toll but—the maximum toll until it is

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reduced, and when it is reduced by a resolution of the company then the reduced amount of toll until it is again raised. I am clearly of opinion in this case that the board was insufficient, and that the respondents were not liable to pay the toll, and that, therefore, the magistrates were quite right in refusing to convict.

Judgment for the respondents.

Solicitors for appellant: *Austen, De Gex, & Harding, for W. Gregson, Southend.*

Solicitors for respondents: *Digby & Jones, for Digby & Evans, Maldon.*

May 16.

DONOVAN *v.* BROWN.

Practice—Appeal by Motion from Inferior Court—Time for entering Appeal —Rules of Supreme Court, Order LVIII., rules 8 *and* 19.

Where a rule is obtained on a motion by way of appeal from an inferior Court, the appeal must be entered in the list at the Crown Office of the Queen's Bench Division under Order LVIII., rule 19, before the day mentioned in the notice to shew cause.

RULE calling on the defendant to shew cause, at the expiration of eight days from the date thereof, why the nonsuit herein, and the judgment (if any) entered thereon, should not be set aside and a new trial had.

The action was tried in the Mayor's Court of London on the 22nd of October, 1878, and this rule was applied for and obtained by the plaintiff on the 5th of November following, and a copy forthwith served on the solicitor for the defendant, but the case was not entered at the Crown Office in the list of appeals from inferior Courts, until the 3rd of February, 1879.

B. Firth, in shewing cause, took the preliminary objection that Order LVIII., rule 19 (1), had not been complied with in time. In

(1) Order LVIII., rule 19: "Every judge of the High Court of Justice for the time being shall be a judge to hear and determine appeals from inferior Courts, under s. 45 of the Supreme Court of Judicature Act, 1873. All such appeals (except Admiralty appeals from inferior Courts, which, until

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In re National Funds Assurance Company (1), it was held that an appeal under rule 8 (2) of the same Order to the Court of Appeal must be entered before the day mentioned in the notice of appeal for hearing, and he contended that that decision was applicable to this case.

Dunlop Hill, for the plaintiff. The motion was made in time, and proper notice was given, and the plaintiff ought not to be barred merely because of the delay in setting the case down, as rule 19 does not provide any limit of time in which this must be done.

THE COURT (Kelly, C.B., and Huddleston, B.), held that no distinction could be drawn in this respect between rule 8 and rule 19, and that *In re National Funds Assurance Company* (1) applied.

Rule discharged.

Solicitors for plaintiff: *James Chapman & Co.*
Solicitors for defendant: *Duffield & Bruty.*

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further order shall be assigned as heretofore to the present Judge of the Admiralty Court), shall be entered in one list by the officers of the Crown Office of the Queen's Bench Division, and shall be heard by such Divisional Court of the Queen's Bench, Common Pleas, or Exchequer Division, as the Presidents of those divisions shall from time to time direct."

(1) 4 Ch. D. 305.

(2) Order LVIII., rule 8. "The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order, or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list, unless the Court of Appeal or a judge thereof, shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal."

1879
March 22.

[IN THE COURT OF APPEAL.]

RUNTZ *v.* SHEFFIELD. (1)

Practice—Time for appealing—Appeal from Order made at Chambers during Long Vacation to Divisional Court—Rules of the Supreme Court, Order LIV., rule 6—Order empowering Plaintiff to sign Judgment upon specially indorsed Writ.

Order LIV., rule 6, which directs that an appeal from a decision at chambers shall be made within eight days, applies to decisions at chambers during the Long Vacation; and if that period has elapsed without the sitting of a Divisional Court, the right to appeal is lost, unless the party decided against obtains an extension of time.

An order empowering the plaintiff to sign judgment upon a specially indorsed writ, was made by a judge at chambers upon the 29th of August: the time for appealing to a Divisional Court was, on the 2nd of September, extended conditionally upon payment into Court of the sum sued for within fourteen days; this condition was never fulfilled, and no Divisional Court sat during the long vacation. Upon the first day of Michaelmas Sittings, the defendant moved the Exchequer Division to set aside the order made upon the 29th of August:—

Held, affirming the decision of the Exchequer Division, that as more than eight days had elapsed since the order was made, no appeal could lie.

APPEAL from an order of the Exchequer Division, affirming an order of Manisty, J., made at chambers.

The facts of the case are sufficiently stated in the judgment of Thesiger, L.J.

Feb. 25. *E. S. Saxton*, for the defendant. A strict construction of Order LIV., rule 6, will in the present case be productive of hardship. *Crom* v. *Samuels* (2) may be relied upon by the plaintiff's counsel, but it is distinguishable upon two grounds: first, during the Long Vacation of 1878, no Divisional Court at which the appeal could be taken sat; secondly, in the present case the defendant gave immediate notice of appeal and duly applied for an extension of time, thus doing all in his power to bring on his appeal at the earliest possible moment. Moreover, *Crom* v. *Samuels* (2), was, it is contended, really decided on the

(1) See now the Rules of the Supreme Court, March, 1879, Order LIV., rule 6.
(2) 2 C. P. D. 21.

ground of the laches of the defendant: otherwise it is inconsistent with the later decision of the Queen's Bench Division in *Forrest* v. *Davis*. (1) It would be unreasonable to deprive the defendant of the power to appeal; and although *Hallums* v. *Hills* (2), was decided upon a different rule, yet it establishes the principle that if the time limited for appealing expires before the party dissatisfied with the decision has an opportunity of applying to the Court, he is entitled to appeal at the next practicable sitting.

Douglas Kingsford, for the plaintiff. The words of Order LIV., rule 6, are peremptory, and do not admit of any exception; it is immaterial that no Divisional Court sat during the Long Vacation. *Deykin* v. *Coleman* (3) is very like the present case, and is conclusive in the plaintiff's favour. Moreover, by the order of the 2nd of September, the defendant received a benefit, for the plaintiff could not sign judgment and issue execution within the period of fourteen days; having received that benefit, he cannot now set aside the order of the 29th of August. The proper course for the defendant to adopt was to obtain an extension of time for appealing under Order LVII., rule 6.

March 22. The following judgments were delivered:—

THESIGER, L.J. This is an appeal from the affirmance by the Exchequer Division of an order of Manisty, J., made at chambers, under which the plaintiff was empowered pursuant to the provisions of Order XIV., rule 1, to sign judgment for the amount of a promissory note sued upon. The learned judge's order was made in the Long Vacation, that is to say, upon the 29th of August in last year. On the 30th of the same month, notice of appeal to the Divisional Court was given, and on the same day a summons to extend the time for appealing was taken out. That summons was heard on the 2nd of September, by Manisty, J., who made an order extending the time to the first sitting of the Divisional Court, conditionally upon payment into Court within fourteen days of 433*l.* 10*s.* 8*d.*, being the amount of the note and interest. The money was not paid into Court within the fourteen days or at any other time, and no sitting of the Divisional Court having

(1) Weekly Notes, 1878, at p. 88. (2) 24 W. R. 956.
(3) 36 L. T. 195; 25 W. R. 294.

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taken place in the interim, the defendant, at the first sitting of the Divisional Court in Michaelmas Sittings, appealed against the order of Manisty, J. The Divisional Court held that this appeal was out of time, and the order appealed against stood affirmed. Upon appeal to this Court the question of time is again raised and has to be decided. The rule, upon which the question turns, is rule 6, of Order LIV., which is in these terms: "In the Queen's Bench, Common Pleas, and Exchequer Divisions, every appeal to the Court from any decision at chambers shall be by motion, and shall be made within eight days after the decision appealed against." The Court below has construed the rule as meaning that the defendant was bound to bring on his appeal within eight days after the decision appealed from, unless the time was extended, and I am of opinion that this contention is correct.

In the first place, the language of the rule is unambiguous; it directs that the appeal shall be by motion, and shall be made within eight days after the decision appealed against. Now, if it is not read in its plain and literal meaning, how is it to be read? Are the words "if practicable," to be taken as understood? If so, are we to read it thus: "and, if not practicable within eight days, then upon the first practicable day afterwards;" or, are we to read it, "within eight practicable days;" i.e., eight days, on each of which the Divisional Court is sitting. If *Hallums* v. *Hills* (1) is to be treated, as it has been argued it should be, as an authority upon the construction of this rule, the latter alternative would seem to be the proper one, in which case a very indefinite, and at times unreasonably extended, period within which to appeal from orders at chambers, would be given. But whichever alternative be adopted, does it not entail the making instead of the interpreting of a rule? And is there any such manifest inconsistency with other rules, or any such necessary hardship consequent upon the interpretation of the particular rule according to its literal meaning as to induce us to depart from that meaning? I think not. The rules have provided against hardship, and at the same time have by their provisions for the exclusion altogether of certain days and the exclusion of other days on certain occa-

(1) 24 W. R. 956.

sions, in the computation of time, indicated, according to the maxim: "Expressum facit cessare tacitum," that they intended no implication to arise as regards other days or in reference to other occasions than those provided for. Suppose the eighth day in this case had expired on a Sunday, then the motion might have been made on the following day pursuant to Order LVII., rule 3, which provides as follows: "Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall so far as regards the time for doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open." By the same rule, if the doing of an act on the last day on which it has to be done is only possible if the offices are open, then if the offices are not open on the particular day, the act may be done on the day on which the offices shall next be open. Where the rules wish to exclude for a particular purpose the Long Vacation from the computation of time, we find express provision, as in the case of filing, amending, or delivering any pleading by Order LVII., rule 5. There is a reason for not excluding the Long Vacation from the computation of time for the purpose of appeal from chambers to a Divisional Court, because the rules contemplate that such a Court will sit during vacation: see s. 28 of the Supreme Court of Judicature Act, 1873, and Order LXI., rules 5, 6; and, lastly, any hardship or injustice, which might otherwise be worked by the strict interpretation of such rules as that, which is in question in this case, can be remedied by rule 6 of Order LVII., which gives the widest power of enlarging the time appointed for the performance of any act either before or after the expiration of such time.

Apart then from authority, I am of opinion that the terms of the rule upon which the present question arises, are absolute and universal in their application, except so far as in other rules a qualification, limitation, or exception is to be found, and consequently that the order of the Court below was right. As regards authority, there is in favour of the view which I have expressed, a distinct decision turning upon the construction of the particular

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rule in *Crom* v. *Samuels* (1), while *Hallums* v. *Hills* (2), which is cited in support of the appellant's contention, is a case upon another rule couched in different language, and a case, the decision on which may well stand with that in *Crom* v. *Samuels* (1) and the present case.

I am of opinion therefore, that the appeal should be dismissed.

BRETT, L.J. I assent to the judgment delivered by Lord Justice Thesiger, with great reluctance; for our decision in favour of the plaintiff seems to amount almost to a denial of justice. I should have been glad to hold that Order LIV., rule 6, does not apply to this case; but on a review of the orders and rules, I feel myself compelled to come to the conclusion that its operation is not confined to the time when the sittings are going on. The appeal must be dismissed.

COTTON, L.J. I also agree with reluctance that the appea must be dismissed; for the rules appear to work a hardship; but relief cannot be given by judicial decision; the remedy must be effected by an alteration of the rules.

Appeal dismissed.

Solicitor for plaintiff: *J. P. Poncione.*
Solicitors for defendant: *Champion, Robinson, & Poole.*

(1) 2 C. P. D. 21. (2) 24 W. R. 956.

[IN THE COURT OF APPEAL.]

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POSTLETHWAITE *v.* FREELAND AND ANOTHER.

Ship—Charterparty—"Cargo to be discharged with all Despatch according to the Custom of the Port"—Delay by Charterer in unloading Vessel through Deficiency of Lighters.

The defendants chartered the plaintiff's vessel, the *C.*, to carry a cargo of rails to the port of L. The charterparty provided that the cargo should be taken from alongside at merchants' risk and expense, and should be "discharged with all despatch according to the custom of the port." By the custom of the port of L. vessels were discharged by lighters worked along a warp, and upon the arrival of a vessel she was reported at the port-office, and in her turn, with respect to vessels which had previously arrived, one lighter was sent to her every working day until she was discharged. Upon the arrival of the *C.* at L. only four of the lighters were suitable for the discharge of her cargo, and seven vessels laden with similar cargoes were already lying there; in consequence of these circumstances the defendants were unable to begin the discharge of the cargo of the *C.* until twenty-four working days had elapsed from her arrival. The plaintiff having sued to recover damages for the detention of the *C.* at L. during these twenty-four days, at the trial the judge directed the jury that, under the circumstances above-mentioned, there was no obligation upon the defendants to provide one lighter for unloading the cargo of the *C.* for every working day after she was ready to unload, and that if the defendants had used the existing appliances at L. with due despatch, according to the custom of the port, the jury ought to find for them:—

Held, by Brett and Thesiger, L.JJ., affirming the decision of the Exchequer Division, Cotton, L.J., dissenting, that the direction was correct.

THIS was an appeal by the plaintiff from an order of Kelly, C.B., and Hawkins, J., discharging an order for a new trial.

The fact of the case and the arguments in this Court are sufficiently stated in the judgments hereinafter set out.

March 1, 3. *Cohen, Q.C.*, and *Bigham*, for the plaintiff; *Watkin Williams, Q.C.*, and *J. A. McLeod*, for the defendants.

In addition to the cases mentioned in the judgments, the following case was referred to in the course of the argument: *Randall* v. *Lynch.* (1)

Cur. adv. vult.

March 22. The following judgments were delivered:—

THESIGER, L.J. The plaintiff in this action was on the 28th of

(1) 2 Camp. 352.

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April, 1875, the owner of a vessel called the *Cumberland Lassie*, and on that day chartered her to the defendants to carry a cargo of about 370 tons of steel rails and fastenings from Barrow-in-Furness to East London, in South Africa, and there discharge. The charterparty provided that the cargo should be brought to and taken from alongside at merchants' risk and expense, and contained the following stipulation: "The cargo is to be discharged with all despatch, according to the custom of the port." The action is brought to recover damages for the alleged breach of such stipulation. The port of East London is situate upon a river having a bar at its mouth, and into which, in consequence, vessels of the burden of the *Cumberland Lassie* are unable to enter until the greater part of their cargo is discharged. The discharge is performed by means of lighters, which are worked to and from the ship in a somewhat unusual manner. There is one large warp or cable from the inside to the outside of the bar; from that warp there branch out minor warps; and to those minor warps vessels loading or unloading their cargoes attach their own cables. The lighters have neither sails nor oars, and are worked by being pulled along the warps and cables, which I have described. In 1875 the business of loading and unloading vessels was mainly conducted by a company called the East London Landing and Shipping Company, to which the warps belonged, and which owned nine or ten lighters for working in conjunction with the warps. Four only of these lighters were suitable to the discharge of the cargo of the *Cumberland Lassie*. The custom or practice of the port, as regards the discharge of vessels, was as follows:—Vessels upon arrival reported themselves at the port-office, and in the order in which they reported themselves, their turn, as it was called, for unloading came in rotation. As soon as a vessel came in turn, one lighter was sent to her, every working day, until such time as she was finally discharged; with the exception that when the mail steamers came in, a preference was given to them. The *Cumberland Lassie* arrived at East London on the 31st of August, 1875, and was ready to commence discharging her cargo on the following day. It happened, however, that at the end of 1874 or the beginning of 1875 the supply of iron rails to the government at East London had commenced, and in consequence the number

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of vessels arriving at the port in the autumn of 1875 was increased, and when the *Cumberland Lassie* arrived, there were already lying in the roadstead seven vessels laden with similar cargoes to her own. The government obtained from Algoa Bay, situate at least 150 miles south of East London, three or four surf boats, two of which appear to have been brought to East London after the *Cumberland Lassie* arrived there, and all of which, with the exception of one under repair, were employed in discharging the vessels which arrived before the *Cumberland Lassie*. In the result the turn for the discharge of that vessel did not come until the 6th of October, when a lighter of the East London Landing and Shipping Company commenced to discharge the cargo. From that time it is not contended on the part of the plaintiff that there was any undue delay, but inasmuch as twenty-four working days intervened between the date of the ship's being ready to discharge and the 6th of October, the plaintiff seeks to recover damages in respect of the non-discharge of cargo during these twenty-four days. The evidence establishes that the time occupied in discharging the vessel was not greater than the average time occupied in discharging vessels of like tonnage during the autumn of 1875. At the trial Lord Coleridge left to the jury to say, first, whether there was any settled practice or custom between the months of April and November, 1875, as to the unloading of sailing vessels, laden as the *Cumberland Lassie* was laden, in the port of East London; secondly, if there was, whether the *Cumberland Lassie* was unloaded with all despatch according to the custom; and the jury having answered both questions in the affirmative, the learned judge directed the verdict and judgment to be entered for the defendants. The plaintiff moved the Exchequer Division for a new trial, on the ground of misdirection and that the verdict was against evidence; and the conditional order for a new trial having been discharged, appealed to this Court.

The argument before us has really resolved itself into a question as to the construction, which the clause in the charterparty, "the cargo is to be discharged with all despatch, according to the custom of the port," when read in conjunction with the facts, ought to bear. The plaintiff contends in substance that Lord

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Coleridge should have told the jury that as soon as the *Cumberland Lassie* was ready to discharge, the defendants ought to have provided her with one lighter for every working day, except, perhaps, days on which the lighters were engaged in discharging the mail-steamers. If the plaintiff is right in this contention, I think it clear that the learned judge did misdirect the jury, for he certainly indicated to them that there was no such obligation upon the defendants to provide lighters; but I am of opinion that the plaintiff is not right in his contention. In order to support it, his counsel treat the clause of the charterparty in question as if the words "with all despatch" were unconnected with the words "according to the custom of the port," and endeavour by that means to read the clause as running in this way—"the cargo is to be discharged according to the custom of the port and with all despatch." Reading the clause in that way, they argue, not without force, that the custom of the port was to regulate the mode of discharge, i.e., the mode of discharging by a single lighter worked by the warps and cables, but was not to regulate the time of commencing the discharge or the rate of despatch, which, it was contended, was to be as fast as one lighter, commencing as soon as the vessel was ready to discharge, could on working days discharge the cargo. In my opinion, however, the words "according to the custom of the port," placed as they are in immediate juxtaposition with the words "with all despatch," were intended to be read, and must be read, so as to qualify these latter words; and if that be so, it appears to me to follow that the practice or custom as to vessels coming on turn was one, which regulated the despatch of the *Cumberland Lassie* just as much as the practice or custom of unloading vessels by lighters worked along the warp or cables. Indeed lighters, warps, and cables may in this case be looked upon as forming one apparatus for unloading, and the plaintiff had no right to complain of the defendants, because this apparatus was, until the 6th of October, occupied by vessels which arrived before the *Cumberland Lassie*, and over which the defendants had no control.

The decision in this Court of *Wright* v. *New Zealand Shipping Company* (1), to which we have been referred, is in no way

(1) See note at end of case.

inconsistent with this view. There the charterparty did not contain any express provision in reference to the discharge of the cargo, and the obligation of the charterer was therefore that implied by law, namely, to discharge within a reasonable time. The ordinary time for discharge of vessels of similar burden with and loaded as the chartered vessel in that case was loaded was proved to be thirty-five days; but owing to a concourse of vessels annually taking place at a particular time of the year at which the plaintiff's vessel happened to arrive, and due in great measure to arrivals of the defendants' own vessels, the lighters were inadequate in point of number, and the plaintiff's vessel was delayed for a much longer period than thirty-five days. Upon that state of facts it was held that the shipowner ought not to be the sufferer from a delay against which the defendants might themselves have provided, in respect of which the charterparty contained no express stipulation, and the cause of which, although recurring at fixed intervals of time, was exceptional when compared with the general state of the port of discharge.

The cases of *Tapscott* v. *Balfour* (1) and *Ashcroft* v. *Crow Orchard Colliery Company, Limited* (2), are also distinguishable from the present. In the former the loading of a cargo of coals was to be in the usual and customary manner, nothing being said as to the time, and it was held that the words applied to the mode of loading only, and that the charterer was responsible for delay which arose from his vessel's inability to get under the tips, that inability again being due to the number of vessels in turn to go under the tips before her, and several of which were loaded by the agent employed by the charterer. It is to be observed, too, that in that case it was proved that, although loading from the tips was the most usual method of loading in the particular dock, it could be, and not unfrequently was, done from lighters; and Denman, J., in his judgment, relies upon the fact as additional support to the view that the charterer, who might have obtained lighters, was responsible for the delay. In *Ashcroft* v. *Crow Orchard Colliery Company* (2), a cargo of coal was to be loaded with the usual despatch of the port, or, if longer detained, the ship was to be paid 40*s.* demurrage; and it was held that the charterers were liable

(1) Law Rep. 8 C. P. 46.

(2) Law Rep. 9 Q. B. 540.

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for a detention outside the docks for an unusual time, that detention being due to the fact that the charterers themselves had, when the charterparty was entered into, three ships loading in the docks and ten other charters in their books having priority over the plaintiff's.

None of the decisions to which I have referred in any way impugned the authority of cases of the class of *Leidemann* v. *Schultz* (1) and *Lawson* v. *Burness* (2), which were decided in favour of the charterer upon words in the charterparty importing that he was only to be bound to take cargo in regular turn of loading. They are merely illustrations of the principle enunciated in *Ford* v. *Cotesworth* (3), and to which my judgment in this case is in no way opposed. That principle is that under a charterparty which provides for the delivery of the cargo in the usual and customary manner, but is silent as to the time to be occupied in the discharge, the law implies a contract that each party will use reasonable diligence in performing that part of the delivery which by the custom of the port falls upon him. Here the use of the warp and lighters in regular turn was part of the custom of the port, by which the discharge "with all despatch" was to be qualified and limited, and by that custom the control of the lighters as well as of the warp was no more in the hands of the charterers than it was in the hands of the shipowners.

For these reasons I am of opinion that the ruling of the learned judge at the trial was correct, that the findings were warranted by the evidence, and that this appeal should fail.

COTTON, L.J. This was an action by the owner of a sailing vessel called the *Cumberland Lassie* against the charterers for detention of his ship. The action was tried before Lord Coleridge, C.J., and resulted in a verdict and judgment for the defendants, and this was an application by way of appeal from the Exchequer Division for a new trial on the ground of misdirection.

By the charterparty, which was dated the 28th of April, 1875, it was agreed that the *Cumberland Lassie* should take a cargo of rails from Barrow-in-Furness to East London in South Africa, and

(1) 14 C. B. 38; 23 L. J. (C.P.) 17.
(2) 1 H. & C. 396.
(3) Law Rep. 4 Q. B. 127; Ex. Ch. 5 Q. B. 544.

it was stipulated that the cargo should be brought to and taken from alongside at merchants' risk and expense; and, further (which is the provision on which the question turns), that the cargo was to be discharged with all despatch according to the custom of the port. It was for delay in accepting delivery of the cargo at the port of discharge that the action was brought. The ship arrived at East London on the 31st day of August, 1875. The harbour there is a bar harbour, and vessels of the size of the *Cumberland Lassie* are obliged to unload a considerable portion of their cargo before they can cross the bar. The discharge of cargoes outside the bar is effected by means of lighters or other small vessels. The usual way by which, in September, 1875, lighters were brought alongside the vessel to be unloaded, was by means of a warp consisting of a rope carried across the bar and fastened to buoys, and on the outside connected with other ropes branching from it; from the ends of these branch warps the lighters were warped to the vessel to be unloaded by a rope provided by that vessel. The complaint of the plaintiff is that for twenty-four working days after the *Cumberland Lassie* arrived at the port no lighter or other vessel was provided by the defendants, the charterers, to accept delivery of the cargo. The defendants admit the fact, but they say that having regard to the terms of the charterparty and the facts proved they are not liable for the delay. It was proved at the trial that at the time when the *Cumberland Lassie* arrived at East London and was in course of unloading, the only lighters for unloading vessels outside the bar, with the exception of three boats belonging to the government, belonged to a company which had purchased these lighters and the warp from the government, that there was a practice or custom at the port that every sailing vessel should be taken in turn for unloading according to the time of her arrival in port, and that when the turn of a vessel arrived she should have the services of one lighter only and once only in the day; that the company had four lighters only capable of carrying iron rails; that mail-steamers were as against sailing vessels entitled to preference in the use of the lighters, and that in regular turn the *Cumberland Lassie* was not entitled to the use of a lighter for discharge of her cargo before the

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twenty-four working days had expired. There was evidence that, having regard to the number of vessels in the port at the time when the *Cumberland Lassie* arrived, and to the number of lighters then at the port available for unloading rails, the turn of the plaintiff's vessel to have a lighter for unloading the cargo did not arrive before the twenty-four days had expired. The defendants contend that the reference to the custom of the port contained in the provisions of the contract, to which I have referred, absolves the defendants from liability. So Lord Coleridge directed the jury. For he in his summing-up in effect directed that if they found that at the date of the charterparty and from that time till the time of unloading there was a practice at the port as to the unloading; and, if so, that the defendants used the existing appliances with due despatch in accordance with the practice, they should find for the defendants. If the delay of which the plaintiff complains was not attributable to what can be called the custom or practice of the port, this was a misdirection. For in the absence of any reference to the custom of the port, and if there was no express stipulation in the contract to regulate in this respect the rights and liabilities of the plaintiff and defendants, it would be the duty of the charterers to provide at or shortly after the vessel was ready to discharge her cargo appliances of the kind ordinarily in use in the port for the purpose of taking delivery, that is, in the present case lighters or other small vessels capable of passing the bar. Did then the reference to the custom of the port vary the defendant's liability in this respect? It was argued that it does so, because the custom or practice of the port was that vessels should be entitled to lighters in turn according to the times of their respective arrivals, and by treating the warp and lighters as one entire instrument for unloading vessels outside the bar. But there was no evidence that a larger number of lighters than were in use at the time in question in the port could not have crossed the bar daily by means of the warp, and on the contrary there was evidence that shortly afterwards a larger number of lighters were employed in unloading vessels and crossed the bar by means of the warp. The delay, therefore, was attributable to the number of lighters at the port being insufficient for the number of vessels.

The number of lighters cannot in my opinion be considered as a matter regulated by or dependent on the custom or practice of the port. It would not, I should think, be contended that, however the business of the port might increase, it could be said to be the custom or practice of the port, that the only lighters for hire there should be such as the company were for the time being possessed of. In my opinion the defendants are not, by the qualifying reference in the charterparty to the custom of the port, protected from liability for delay caused by the number of lighters at the port being insufficient for the vessels for the time being in the port. It is said that this will make the words "according to the custom of the port" inoperative and strike them out of the contract. But in my opinion this is not the case. These words will qualify the words "with all despatch" by excusing any delay caused, for example, by the preference given by the practice of the port to mail-steamers, or by no work being done on those days, which it is the practice of the port to observe as holidays.

It was much pressed in the course of the argument that it was impossible for the charterers to provide more lighters. But if the construction which I have put upon the contract is correct, the defendants cannot protect themselves from liability to pay damages to the plaintiff for the delay by alleging that this is attributable to their inability to discharge an obligation, which the defendants as between themselves and the plaintiff had undertaken.

It was said that the number of the lighters was insufficient, in consequence of there being at the time an unusually large number of vessels which were waiting to discharge their cargoes. In my opinion, if such was the case, it cannot excuse the defendants from liability. For if such was the case, the delay would be caused by an accident, of which, as between themselves and the plaintiff, the defendants must bear the loss.

BRETT, L.J. The only question before the Court is whether there should be a new trial, on the ground of misdirection. In effect the jury found that the ship had been discharged according to the provisions of the charterparty. Lord Coleridge asked the jury whether there was a settled practice at the port of East

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London, and whether the ship had been discharged according to that practice. They found both these questions in the affirmative. So far it is impossible to say that there was the slightest misdirection; for the questions which I have mentioned were such as it was necessary to ask the jury. But it was contended that there was misdirection with regard to what might properly be called a part of the practice of the port, and it will be found, I think, that the real objection is, that Lord Coleridge allowed certain matters to be given in evidence, which could not, it was alleged, be deemed in law to be part of the practice of the port. Evidence was given that the only lighters available to either shipowner or charterer belonged to either a particular company or the government, and that they were supplied to the ships only in turn. It was shewn that this mode of unloading vessels had existed for so long a time as to amount to a custom. It is suggested that this evidence, which was accepted by the jury, was immaterial, for it is excluded by the clause in the charterparty, which provides that the cargo shall be "discharged with all despatch, according to the custom of the port." To me this clause seems to mean that the ship was to be discharged with all such despatch as was consistent with the manner and the process, wherewith every vessel going to that port is discharged. What are the manner and the process by which a vessel is discharged at East London? If she cannot cross the bar, she must lie outside and discharge her cargo, at least in part, into lighters. These lighters have to be brought out along a fixed warp, and after they have got across the bar they have to be taken to the ship lying in the roadstead by means of branch warps, and also of ropes coming out from her. By a similar process they return inside the bar, and when empty are warped out again to the ship. East London is 150 miles at least from any other port from which additional lighters can be procured, and as a matter of business it was impossible to procure them upon any emergency arising at East London. Therefore the mode of discharging vessels arriving at this port would be by lighters belonging to this port, and according to the evidence no lighters from any other port were ever sent for or used, and the lighters at East London could not be procured at pleasure, but were supplied in a particular way by a company or by the government, that is, only one lighter was

every day supplied to each vessel, and the supply commenced in the vessel's "turn" after her arrival at the port. It follows that the manner in which, or the process by which, every ship which arrived at that port had to be unloaded, was by placing herself upon "turn," by waiting until her "turn" came, and then by discharging her cargo into the one lighter sent to her every day, regard being had to the mail steamers. I am so far from thinking that these circumstances cannot form part of the custom at East London, that they seem to me to form the only real and substantial part of the custom. The essential part of the custom in favour of the charterers was, that they were not bound to discharge the plaintiff's ship until her "turn" came to have a lighter from the company or the government. It is admitted that unless the defendants were bound to fetch lighters from another port, every possible diligence was used in discharging the *Cumberland Lassie*. The defendants did all that they were bound to do, and they were excused by the custom from doing that which the plaintiff complains of as an omission. In my opinion the evidence objected to was properly admitted, the finding of the jury was right, and, so far as I can see, no other conclusion could have been arrived at.

In my opinion the decision of the Exchequer Division ought to be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Chester, Urquhart, Mayhew, & Holden, for R. B. D. Bradshaw, Barrow.*

Solicitors for defendants: *Allin & Greenop.*

[IN THE COURT OF APPEAL.]

June 28.

WRIGHT *v.* NEW ZEALAND SHIPPING COMPANY, LIMITED.

Ship—Charterparty—"Cargo to be brought to and taken from alongside free of Expense and Risk to the Ship"—Delay by Charterer in unloading Vessel through Deficiency of Lighters.

The defendants chartered the plaintiff's vessel, the *C.*, for a voyage to the port of L. The charterparty provided that the cargo was "to be brought to and taken alongside free of expense and risk to the ship;" but it contained no other clause as to discharging the cargo. The number of lighters at L. was small, and

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when the *C.* arrived, the port was crowded with vessels, about half of which belonged to the defendants or had been consigned to them. Seventy-two days elapsed after the arrival of the *C.* before her discharge was completed by the defendants' agents; but the number of days upon which the cargo was unloaded was only thirty-four. The delay arose from the lighters being engaged in discharging the other vessels lying at the port:—

Held, that in determining whether the terms of the charterparty had been broken by the defendants, the delay occasioned by the lighters being engaged in discharging other vessels was not to be taken into account.

ACTION against charterers by the owner of the ship *China* for not unloading her with due and reasonable despatch and within a reasonable time, and for demurrage.

The cause came on for trial at the Northumberland Spring Assizes, 1878, before Pollock, B., and a special jury, and the following were the material facts of the case.

By a charterparty dated the 30th of September, 1873, the plaintiff undertook that his ship the *China* should take on board in London "all such cargo . . . . as may be required by the charterers, and on being despatched shall with all due speed proceed to Lyttleton, New Zealand, and there shall deliver the said cargo, &c., as per bills of lading, into lighters alongside or at the wharf as charterers' agents may direct, ship always being afloat. . . . The charterers may ship one thousand tons rails, and may load the vessel to an average draught of 20 feet. . . . The cargo to be brought to and taken from alongside free of expense and risk to the ship . . . . the ship is to be consigned inwards only to the" defendants "or their agents in the colony." Except as above mentioned the charterparty contained no clause as to discharging the *China* at Port Lyttleton. She was ordered by the defendants to the West India Docks in London, and there loaded a general cargo consisting partly of iron, and on the 14th of November, having completed the loading, was hauled out of dock into the Thames and proceeded on her voyage to Port Lyttleton, where she arrived on the 16th of March, 1874, and upon the 18th was placed in a discharging berth, one mile and a quarter from the town, to which she could not go nearer owing to her draught of water. At Port Lyttleton were only two firms of lightermen for discharging cargoes, one of which, Messrs. Cameron Brothers, worked solely for the defendants, and the *China* being consigned to the order of the defendants or their agents, her captain was compelled to employ Messrs. Cameron alone to discharge her. Some bulls and sheep, which she had carried on deck, were sent ashore about a week after her arrival; but otherwise the discharging of her cargo did not commence until the 30th of March, and was not completed until the 29th of May, a period of seventy-two days from the time of arriving at her berth. The number of days actually employed in unloading the *China* was only thirty-four, and the discharge was effected by the aid of lighters; after deducting the Sundays, Good Friday, and Easter Monday, when no work was done, and three or four days when the weather was stormy, the delay in unloading was occasioned solely by the failure of Messrs. Cameron to send lighters alongside the *China*. Port Lyttleton at the season when the *China* arrived was usually crowded by a "rush" of vessels; in March and April, 1874, about twenty vessels were lying there, of which one-half either belonged to or were chartered by the defendants. The number of lighters was small; and it was proved that after the

arrival of the *China* preference as to discharging cargoes was shewn by the defendants' agents to vessels with "round" charters, that is, to vessels chartered for the voyage from a British port and back again. After part of the cargo had been discharged, the berth of the *China* was shifted to within three-quarters of a mile from the shore. If ordinary despatch had been used, the cargo of the *China* would have been unloaded in thirty-five days after she was moored at her discharging berth on the 18th of March, 1874.

Pollock, B., in summing up told the jury that they were to take into consideration the circumstance that the port was full of vessels, but he did not tell them that they were not to consider the deficiency of lighters caused by the large number of ships so far as that state of things had been produced by the defendants themselves; nor did he tell them that the defendants were bound to provide the means of unloading within a reasonable time; nor that they were bound at all events to allot the lighters proportionately amongst the vessels or to use the lighters for them in the order in which they arrived.

The jury found in favour of the defendants, and judgment was entered for them.

An order nisi for a new trial was obtained in the Queen's Bench Division on the ground of misdirection, and of the verdict being against the weight of evidence, and was after argument made absolute by Cockburn, C.J., and Mellor, J.

The defendants appealed.

1878. June 27. *Cave*, *Q.C.*, and *H. Shield*, for the defendants. The defendants are not liable in the present action, for they did all that could be reasonably required for the discharge of the *China*, regard being had to the other vessels then lying at Port Lyttleton; the defendants, as far as was practicable, availed themselves of the ordinary facilities of the port, and if the number of lighters happened to be too small for the occasion, that was a contingency against which the defendants were not bound to provide.

Herschell, *Q.C.*, and *J. P. Aspinall*, for the plaintiff. Under a charterparty like that entered into between the parties to this action the owner of the ship is entitled to have her unloaded within a reasonable time; this is the rule to be deduced from *Ford* v. *Cotesworth* (1), and *Adams* v. *Royal Mail Steam Packet Co.* (2). The defendants thought fit to allow only one of the firms of lightermen to be employed: they ought to have allowed the other to be employed or to have obtained lighters elsewhere. They in part at least caused the delay by sending so many other vessels to Port Lyttleton at the time when the *China* was expected.

Shield, in reply. The defendants were entitled to take into account their engagements with other ships; the plaintiff was bound to submit to any loss or inconvenience arising from the crowded state of the port.

Cur. adv. vult.

June 28. The following judgments were delivered:—

BRAMWELL, L.J. I am of opinion that this appeal should be dismissed. I

(1) Law Rep. 4 Q. B. 127; Ex. Ch. 5 Q. B. 544.

(2) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.

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think that the order of the Queen's Bench Division was right: for, as it seems to me, the finding of the jury was against the weight of evidence and cannot be supported.

The charterparty contained no statement as to the number of days, which should be allowed to the charterers for discharging the cargo; they were therefore bound to unload the vessel within a reasonable time. In my judgment a reasonable time for doing an act is a time within which it can be done by a person working reasonably; but the time which he spends in making his preparations for doing the act is not to be taken into account. Applying this rule to the present case, I think that the defendants, upon the arrival of the ship, were bound to have lighters ready to discharge her forthwith, and were not entitled to excuse the omission to do so on the ground that at the port of discharge there was only a certain number of lighters, and when the plaintiff's vessel arrived other ships belonging to other persons required those lighters, and the defendants got lighters for unloading the cargo as soon as they could. To my mind these circumstances afford no answer to the plaintiff's complaint: the defendants having undertaken to unload the vessel were bound to be ready to do it, and to finish it within a reasonable time.

If I have stated the law correctly, it is manifest that the finding of the jury is against the weight of evidence, for the contention of the defendants is not that they discharged the cargo within a reasonable time, according to the interpretation of the expression already mentioned, but that they discharged it within a reasonable time, if they are at liberty to take into account the embarrassment under which they were on account of there being only a certain number of lighters and a large collection of ships. In considering facts like these it is necessary to take into account what may be called the physical condition of the port: if a vessel cannot get within two miles of the shore, the charterers must have a longer time for unloading her than if she could come within a few yards; and, as it seems to me, if it is convenient for her to get nearer the shore after she has been lightened, the time consumed in bringing her nearer the shore is not to be reckoned as part of the time, within which the charterer is bound to unload her. Circumstances of this sort may be taken into account, but not such as are relied upon by the defendants in this case. A difficulty may arise where a ship is bound to go to a certain place which is inaccessible, but in the present case, if it was an obligation upon the defendants to be ready to discharge the vessel upon her arrival, they are responsible although the delay arose from the port being occupied by other vessels. It may be different where both parties have agreed that the ship shall be discharged in a dock, and the ship on her arrival cannot get into the dock on account of some defect at the entrance which is not the fault of the shipowner or the charterer; in such a case as that neither of them is liable, for neither of them has made default in doing, within a reasonable time, what he is bound to do, and it would be as unreasonable to say that the charterer had not discharged the ship within a reasonable time, as it would be to say that the owner of the ship had not brought her into dock within a reasonable time; neither statement would be well founded. To explain my meaning, I may put an illustration: if I order a coat of a tailor, he must make it within a reasonable time, that is, a reasonable time for a man who has the workmen and materials for making the coat; in estimating that reasonable time he ought not to be

allowed any time for buying the cloth and other materials and for hiring the workmen.

This is the view of the law which I take. Cotton, L.J., has communicated to me the substance of the judgment which he is about to deliver, and I entirely agree with it.

COTTON, L.J. I agree in thinking that there must be a new trial, that is to say, that even according to the ruling of the learned judge at the trial the judges of the Queen's Bench Division were right in holding that the cause must be tried again. This consideration really disposes of the appeal; but I think it right to say what, in my opinion, after the argument before us, is the law applicable to the facts in order that the case may not come to this Court after a second trial.

The contract between the parties imposed upon the charterers the obligation to unload within a reasonable time, for as no time is mentioned, the unloading must be done within a reasonable time. In a contract of this nature a difficulty arises as to the meaning of the expression "reasonable time," and I think that the difficulty arises from not considering what the obligations of the parties are, and from not considering what facts are to be taken into account as between the parties to the contract in ascertaining what is a reasonable time. Therefore I propose to state what is the obligation of the charterers under these circumstances, and what they are entitled and what they are not entitled to take into account in fixing what is a reasonable time. I shall not attempt to lay down an exhaustive rule, but shall speak chiefly with reference to the case before us. In determining whether a duty such as is created by this charterparty has been performed within a reasonable time, we must take it that an obligation is imposed on the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port, and that he must have them ready either when the ship arrives, or within a short time, such as a day or a couple of days, after her arrival; perhaps where a ship arrives unexpectedly, much sooner than could have been anticipated, a delay may be allowed, and a different rule may be applicable from that governing a case where the ship arrives at the appointed time. I say "appliances of the kind ordinarily used at the port" for which the ship is destined, because the charterer ought not to be called upon to provide appliances which are not in use there but which are in use at other ports; he is not bound to provide at a port in New Zealand appliances, which are not in use there but are in use in the port of London; for they cannot be deemed to have been in the contemplation of the parties. Although the charterer may not be bound to work during the whole of the twenty-four hours, yet he must work during the ordinary time of working at the port where the ship is to unload. I will proceed to consider what circumstances will entitle the charterer to allowances for delay. I apprehend that he will be entitled to an allowance if any difficulty arises from the natural or physical peculiarities of the port, such as that the ship is obliged to lie at some considerable distance from the land, or that while the wind is blowing from certain points of the compass ships cannot be unloaded into lighters: he may be entitled to an allowance also if after a ship has been partly unloaded in deep water, she is brought into shallower water for the more convenient discharge of her cargo: whether the unloading can go on during the change of berth is a question of fact upon which the jury must give their opinion. I think also that allowance must be made for any holidays usually

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observed at the port, and during which no work is done. There may be other circumstances entitling the charterer to allowances; and the defendants in the present case appear to be entitled to allowances for the circumstances above-mentioned. But are they entitled to allowances for the circumstance upon which their counsel chiefly relied? It was contended, as I understood, that because the defendants had other ships at Port Lyttleton, and other ships were lying there consigned or belonging to other owners, and because the number of the lighters at the port was limited, they are not liable to the plaintiff for the delay which has occurred. I think that upon this point the finding is unsatisfactory with regard to the evidence. But is the contention for the defendants sound in point of law? In my opinion it is not. For the purpose of ascertaining what is a reasonable time the defendants are not entitled to excuse delay, which would be otherwise inexcusable, by alleging that they had sent so many vessels to the port that the number of lighters which they had engaged did not enable them to unload the plaintiff's ship within what would otherwise have been a reasonable time. It was the duty of the defendants to provide sufficient appliances for unloading the plaintiff's ship. In like manner the defendants cannot excuse the delay by alleging that there were at the port so many other vessels consigned or belonging to other persons as to prevent them from using the appliances, which otherwise might have been used for the purpose of unloading the ship. Upon the principles which I have stated the question must be decided what is a reasonable time for unloading the plaintiff's vessel according to the charterparty.

THESIGER, L.J. I am of the same opinion. The contract between the parties to this action was that which the law implies, namely, that the ship should be unloaded at her port of discharge within a reasonable time. A reasonable time means a reasonable time under ordinary circumstances, and in the absence of some stipulation altering the implied contract between the parties the charterers would not be relieved from the consequences of fortuitous or unforeseen impediments affecting only the due performance by them of their part of the contract. This seems to be a result of the cases of *Adams* v. *Royal Mail Steam Packet Company* (1) and *Ford* v. *Cotesworth*. (2) In the present case it is proved that at Port Lyttleton about thirty-five working days would in general be occupied in discharging a vessel of the burden of the *China*, loaded as she was loaded under the charterparty in question; but it is said on the part of the defendants that at the particular time of the year at which she arrived at the port the concourse of vessels was, as a yearly occurrence, such that lighters could not be obtained regularly enough to discharge the vessel within the time mentioned. Now, although that circumstance might be one which did, as a matter of fact, recur at the same time in each year, it was not in my opinion, an ordinary circumstance of the port, the consequence of which the shipowner was to be called upon to bear. He has a right to assume, when he contracts to discharge the cargo into lighters, that the charterers will provide a proper supply of lighters to unload the cargo within such time as would be reasonable, having regard to the character of the vessel and the quantity and description of the cargo, and the event of there not being sufficient lighters for the purpose is one of those fortuitous or unforeseen

(1) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.

(2) Law Rep. 4 Q. B. 127; Ex. Ch. 5 Q. B. 544.

(unforeseen at least as regards the shipowner) impediments affecting only the due performance by the charterers of their part of the contract, and from the consequences of which they are not relieved. And, as a matter of common fairness, they ought not to be relieved from them, unless some express stipulation upon the point is made in the contract of charter, and for this reason, namely, that the shipowner cannot in any way control the arrangement as to lighters, and cannot be supposed to know the times at which owing to the circumstances of the particular port there may be a difficulty in obtaining them. He therefore makes his arrangements for the employment of his vessel with reference to the time within which, under ordinary circumstances (and amongst them the circumstance of a due supply of lighters), his vessel will be discharged. On the other hand, the charterers have a control as well as knowledge in the matter, and can, if they choose, make special arrangements to meet special emergencies; and if they do not choose to make those special arrangements in order that the chartered vessel may be unloaded within a time which would be reasonable under what the shipowner would naturally and properly assume to be the ordinary circumstances of the port, it is but reasonable that they should indemnify the shipowner for the loss thereby sustained. If this be the law, it is clear, and indeed it is admitted by counsel for the defendants, that the jury had not the law presented to them as it should have been; and for that reason therefore there should be a new trial; but even assuming that the difficulty in obtaining lighters caused by the rush of vessels to the port of discharge at the particular time in question were to be taken into account in favour of the defendants, I am further of opinion that upon the facts of this particular case the verdict was against the evidence and should be set aside.

Appeal dismissed.

Solicitor for plaintiff: *H. C. Coote, for H. A. Adamson, North Shields.*
Solicitors for defendants: *Hollams, Son, & Coward.*

The above case of *Wright* v. *New Zealand Shipping Company* was not tried a second time, but after the judgment of the Court of Appeal the defendants paid into court a sum of about 230*l.*, which the plaintiff accepted in satisfaction of his causes of action.

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May 26.

THE ATTORNEY GENERAL AND THE HUMBER CONSERVANCY COMMISSIONERS AND OTHERS *v.* CONSTABLE AND ANOTHER.

Crown, Prerogative of the—Right of Sovereign to Injunction to restrain Action —Jurisdiction of Exchequer Division in Matters affecting Revenue—Judicature Act, 1873, *s.* 24, *sub-s.* 5, *s.* 34—*Rules of Supreme Court, Order LXII.*

The prerogative of the Crown to intervene in actions affecting the rights or revenue of the Sovereign has not been affected by the Judicature Acts; and for the determination of such matters the Exchequer Division of the High Court of Justice has all the powers formerly possessed by the Court of Exchequer.

THIS was an application by the Attorney General, on behalf of her Majesty, to restrain an action brought in the Chancery Division, and to remove it into this Division, on the ground that the matters in question in the action concerned her Majesty's revenue and privileges.

It appeared that in March, 1878, Sir Frederick Augustus Talbot Constable and Thomas Constable commenced an action in the Chancery Division, before Malins, V.C., against the Humber Conservancy Commissioners, and the Guild or Brotherhood of Masters and Pilots, Seamen of the Trinity House in Kingston-upon-Hull, claiming a declaration that the plaintiffs in that action were seised of the foreshore of the river Humber and the estuary thereof within the seigniory, liberty, manor, and fee of Holderness, in the county of York, and for an order on the defendants in that action to deliver up possession of certain parts thereof, and for an injunction to restrain them from continuing in possession thereof.

The Attorney General subsequently filed an information and bill in this Division, against the plaintiffs in that action, from which it appeared that the Crown claimed the foreshore of the river Humber, and had leased the part claimed in the action above mentioned to the Humber Conservancy Commissioners, who had underleased to the Guild or Brotherhood of Masters and Pilots.

Sir John Holker, A.G., Sir Hardinge Giffard, S.G., W. W. Karslake, and *C. Bowen,* in support of the application. They cited

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Attorney General v. *Barker* (1), and relied upon the absence of anything in the Judicature Acts restricting the right of the Crown to have all cases touching her Majesty's revenue dealt with in this court. They also referred to *Leonard* v. *Rogers* (2); *Attorney General* v. *St. Aubyn* (3); *Attorney General* v. *Hallett* (4); *Cawthorne* v. *Campbell.* (5)

Wills, Q.C., and *Nalder*, for the defendants, contended that the Judicature Act, 1873, s. 24, sub-s. 5, applied, and that no injunction could issue, and no transfer, except under Order LI., rules 1 and 2, by order of the Lord Chancellor or of a judge of the division to which the action is assigned, with the consent of the president of the division to which the action is proposed to be transferred. The Crown may be bound by an Act of Parliament, though not expressly named, if the words used are wide enough to include all cases of a class, and so those in which the Crown is interested: *Moore* v. *Smith.* (6)

KELLY, C.B. I think the order moved for should be made. The case of the *Attorney General* v. *Barker* (1) clearly shews that it was settled law before the Judicature Acts that it was part of the prerogative of the Crown that the Sovereign was entitled to be an actor in any litigation affecting the rights of the Crown, and to determine in the Court of Exchequer any matter in which the Crown is interested. We are called on to consider whether this prerogative is taken away or extinguished by the Judicature Acts, for if the matter is made to depend on the discretion of a judge of a court, or of the president of a division, that is inconsistent with the exercise of the right as of right, and the prerogative will have ceased to exist. The language of the Judicature Act appears to me to point to the exemption of this court as a court of revenue from the clause relating to transfer of causes. Sect. 34 of the Judicature Act, 1873, assigns to this court all causes or matters which would have been within the exclusive cognizance of the Court of Exchequer as a court of revenue; and Order LXII. exempts from the operation of the rules proceedings on the revenue side of the Exchequer Division. The exclusive

(1) Law Rep. 7 Ex. 177.
(2) Wightw. 204.
(3) Wightw. 167.
(4) 15 M. & W. 97.
(5) 1 Anstr. 205.
(6) 1 E. & E. 597; 28 L. J. (M.C.) 126.

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jurisdiction and procedure of this court in matters affecting the revenues and rights of the Crown are therefore preserved as before the Judicature Acts, and the case of *Attorney General* v. *Barker* (1) governs the present application.

There is, however, apart from these provisions, another consideration, which is conclusive on the point, and that is, that by the common law of the realm, and from time immemorial, the prerogative rights of the Crown cannot be restricted by an Act of Parliament without express words; and in the Judicature Acts there are certainly no words which limit the right of the Crown in respect of the decision of questions affecting the revenue. The order must therefore be made absolute.

HUDDLESTON, B., concurred.

Order absolute.

Solicitors for defendants: *Collyer-Bristow, Withers, & Russell.*
Solicitor for Crown: *Solicitor to the Board of Trade.*

June 23.

BUCKTON *v.* HIGGS.

Practice—Costs of Action up to and after Payment into Court—Rules of Supreme Court, Order XXX., rule 1—*Order LV. rule* 1.

In an action for damages for breach of covenant the defendant denied the breach, and also paid money into court, alleging that it was enough to satisfy the claim. The plaintiff replied joining issue, alleging that the money was not enough, and the issues having been referred to an official referee, he reported that the money paid in was enough to satisfy the claim:—

Held, that the costs were in the discretion of the Court under Order LV. rule 1, and that the discretion in such cases ought to be exercised by allowing the plaintiff his costs of the action up to the time of payment into court, and allowing the defendant his costs of the action after that time.

Langridge v. *Campbell* (2 Ex. D. 281) discussed.

THIS was a motion by the defendant that the Court might adopt the report of the official referee, and that the defendant might have judgment on the report, and also judgment for the costs of the action and of the reference to the official referee.

The action was for breach of a covenant to keep in repair a house let to the defendant on lease, and the plaintiff claimed 500*l.* damages. The defendant traversed the breach, and denied all liability, and also paid into court 150*l.*, and alleged that that was

(1) Law Rep. 7 Ex. 177.

sufficient to satisfy the plaintiff's claim. The plaintiff replied joining issue, and alleging that the 150*l.* was not sufficient. The issues having been referred to an official referee, he reported that the money paid into court was sufficient to cover any just claim which the plaintiff had in respect of the dilapidations, the subject of the action.

Nasmith, for the defendant, in support of the motion, contended that he was entitled to the whole costs of the action on the authority of *Langridge* v. *Campbell*. (1)

[KELLY, C.B. The plaintiff has been compelled to bring this action in order to get the 150*l.* The defendant ought to have paid that sum before action. In *Langridge* v. *Campbell* (1) the costs of the cause were "to abide the event." There were no pleadings, and I expressly limited my decision to cases in which there were no pleadings.

HAWKINS, J. In that case I decided at chambers that the plaintiff ought to have his costs of the action up to the time of payment into court, and the defendant his costs after that time, and I have never changed my opinion.]

A. Powell, for the plaintiff, contended that the costs were in the discretion of the Court under Order LV., and that the plaintiff ought at least to have his costs up to the time of payment into court.

PER CURIAM (Kelly, C.B., and Hawkins, J.). The costs are in the discretion of the Court under Order LV. rule 1, and the proper mode of exercising that discretion in such cases is by directing that the plaintiff have his costs of the action up to the time of payment into court, and that the defendant have his costs of the action after that time.

Order absolute that judgment be entered for the defendant in accordance with the report of the official referee, with costs of action from the date of payment into court and of the reference; the plaintiff to have costs of action up to payment into court.

Solicitors for plaintiff: *S. W. Johnson & Son.*

Solicitors for defendant: *Keighley, Shea, & Bevan.*

(1) 2 Ex. D. 281.

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May 2.

[IN THE COURT OF APPEAL.]

MYERS *v.* DEFRIES AND OTHERS.
SIDDONS *v.* LAWRENCE.

Practice—Costs—Order LV.—Jurisdiction of Divisional Court to entertain an Application for Costs after Trial.

The Divisional Court has under Order LV. an original jurisdiction to make an order to deprive a successful party of the costs of an action tried before a jury.

The decisions of the Queen's Bench Division and Exchequer Division affirmed.

MYERS *v.* DEFRIES.

ACTION for maliciously and without reasonable and probable cause presenting a petition in the county court of Surrey holden at Croydon, praying that the plaintiff might be adjudicated a bankrupt; also for libel, and slanders, and trespass.

Defence, a denial of the statements in the claim: that the trespass was committed in execution of an order of the Registrar of the County Court of Surrey holden at Croydon: that the words complained of were not libellous.

Issue thereon.

At the trial before Cockburn, C.J., during the Trinity Sittings, 1877, at Westminster, the jury found a verdict for the plaintiff with 250*l.* damages. The Exchequer Division in the following Michaelmas Sittings ordered a new trial. At the second trial before Huddleston, B., during Easter Sittings, 1878, at Westminster, the learned judge directed judgment to be entered for the defendants on the counts for malicious prosecution and trespass, and for the plaintiff on the count for libel with one farthing damages. The learned judge made no order at the trial as to costs. The plaintiff signed judgment for one farthing, made out his bill of costs for taxation and obtained an appointment before the master claiming to be entitled to costs, on the authority of *Garnett* v. *Bradley*. (1)

On the 17th of March, 1879, an order was made by the Exchequer Division at the instance of the defendants, that the plaintiff have no costs of the action, and that there be no costs of the motion on either side.

The plaintiff appealed.

(1) 3 App. Cas. 944.

SIDDONS *v.* LAWRENCE. (1)

ACTION for malicious prosecution.

At the trial before Cleasby, B., at the Spring Assizes for the county of Rutland on the 19th of March, 1878, the jury found a verdict for the plaintiff damages one farthing. (2) The plaintiff signed judgment in June, and on the 22nd of that month delivered his bill of costs and made an appointment before the master for its taxation: at the defendant's request the taxation was delayed until the 3rd of July, when the plaintiff obtained the master's allocatur. On the 3rd of July, the defendant obtained an order for a stay of execution and gave the plaintiff notice that a motion would be made to deprive him of his costs. On the 23rd of December the Queen's Bench Division gave judgment that the plaintiff do bear and pay his own costs of the action.

The plaintiff appealed.

Murphy, Q.C., and *Clay*, for the plaintiff in the first case. The true construction of Order LV. (3) is that the judge at the trial, for good cause shewn, has jurisdiction over the costs of a cause subject to an appeal from his decision to the divisional Court: but in the present case the judge made no order as to costs,

(1) The Court desired that these cases should be argued together.

(2) 4 Q. B. D. 100.

(3) Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the judge before whom such action or issue is tried or the Court shall otherwise order.

Judicature Act, 1873, s. 49: "No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order."

Appellate Jurisdiction Act, 1876, s. 17: "On and after the 1st day of December, 1876, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceeding on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the judge before whom the trial or hearing of the cause took place."

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and the divisional Court has no original jurisdiction over costs when the cause is tried by a jury. And if a case comes before a divisional Court with a view of altering an existing finding, or granting a new trial, or on a motion for judgment, in all these cases that Court would under the words of Order LV. have power to deal with the costs. Under the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17, it is the intention of the legislature that all proceedings arising out of an action should be dealt with by a single judge, and should not come before a divisional Court, therefore the judge at the trial was bound to deal with the costs, and as he has not dealt with them the plaintiff is entitled to them and cannot be deprived of them. There is no express authority on the point except the cases of *Bowey* v. *Bell* (1), and those cases argued at the same time and reported with that case; from which the present case is virtually an appeal. The same point was raised in *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.* (2), and *Baker* v. *Oakes* (3), but it was unnecessary to decide it; the opinions expressed by judges in those cases are obiter dicta.

Graham, for the plaintiff in the second case. This case differs from *Myers* v. *Defries* in this respect, that judgment has been signed, the costs taxed, and the plaintiff has the master's allocatur, he could have therefore issued execution for the damages and costs. After judgment signed and while it is in existence, there is no power in a judge or in the divisional Court to deprive the plaintiff of his costs. The reasonable construction of Order LV. is that if an action is tried and determined by the finding of the jury then the costs follow the event, or are in the discretion of the judge; but if an issue is tried it may or may not determine the action, and then it would come before the divisional Court, who would have to decide upon the question of costs. The words "for good cause shewn," overrides the whole sentence, and neither Court nor judge can deal with the costs except upon good cause shewn. Here the judgment is for damages and costs, and is a valid judgment which cannot be got rid of, and as long as it stands the plaintiff cannot be deprived of costs. If, on the 3rd of

(1) 4 Q. B. D. 95. (2) 2 Ex. D. 467.

(3) 2 Q. B. D. 171.

July, the plaintiff had issued execution, it would have been valid. The object of s. 17 of the Appellate Jurisdiction Act, 1876, was to husband the strength of the divisional Courts, and take away from them all jurisdiction in matters which arose out of an action, and all business which arises out of an action must be dealt with by a single judge. The divisional Court and this Court have no jurisdiction to deprive the plaintiff of his costs.

Gates, Q.C., and *E. Pollock*, for the defendants in the first case. The construction to be put on Order LV. is correctly stated by Cockburn, C.J., in *Baker* v. *Oakes*. (1) It is that by "Order LV., provision is made that, as a general rule, on a trial by jury, costs shall follow the event, but it is to be in the power of the judge on application at the trial, to make any order as to costs which he may think proper, where in his opinion the circumstances justify a departure from the general rule. There is also a power given to the Court to make an order to deprive a successful party of his costs to which he would otherwise be entitled by the event of the trial." That is the true view of Order LV., and the same construction has been put on it by the judges of the Exchequer Division in *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.* (2) If the divisional Court has jurisdiction, there can be no appeal, for it is taken away by s. 49 of the Judicature Act, 1873.

C. A. Cripps, for the defendant, in the second case. Under Order LV., there are two original jurisdictions created with regard to costs. One in the judge at the trial, the other in the divisional Court. It is perhaps possible to read the sentence as conferring on the divisional Court a jurisdiction original or appellate, but the use of the disjunctive particle "or" shews that the more correct construction is to read it as conferring an original jurisdiction. [He referred to the judgment of Lord Blackburn in *Garnett* v. *Bradley* (3), as shewing that the power of the Court was discretionary.]

BRAMWELL, L.J. I am of opinion that these appeals ought to be dismissed.

It must be admitted that the words "or the Court shall other-

(1) 2 Q. B. D. 171. (2) 2 Ex. D. 467.
(3) 3 App. Cas. at p. 964.

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wise order," must have some meaning, and the question is do they mean that there shall be an appeal to the Court from the judge, which is one meaning which has been attributed to them during the argument, or do they mean that there is an independent power in the Court to have discretion over the costs. I am of opinion that the latter is the meaning, and I am further of opinion that it is absolutely necessary that those words "or the Court" should be inserted in the clause. The proviso of Order LV. is "That where any action or issue is tried by a jury the costs shall follow the event unless upon application made at the trial, for good cause shewn, the judge before whom such action is tried or the Court shall otherwise order." Therefore that provides that where any action or issue is tried by a jury the costs shall follow the event. The word "event" cannot mean the event of the verdict, because it is possible that upon the only question in issue before the jury, the verdict might be for one party and yet the judge upon the whole case might give judgment for the other. Therefore it cannot possibly mean that the costs of the action shall follow the verdict of the jury, otherwise the most unjust consequences might ensue. I assume it must mean this: that where any action is tried by a jury the costs of the cause shall follow the event of the cause. If that is the meaning, I think that "the Court" must have the power "to otherwise order," because the event of the cause may not be known to the judge before whom the action is tried, and he may not be able to tell what the event will be. A particular issue only may be sent down for trial by a jury, and it may be that the judge may not be able to pronounce judgment at the time. Therefore it seems to me necessary that the words "unless the Court shall otherwise order," should be inserted in the clause.

Then there is another possible condition of things which seems to me to shew it is necessary. Let us suppose something is presented to the Court which was not in evidence before the judge at the trial, and the Court were to say, if that circumstance had been brought before the judge at the trial it would have been good cause, but as it was not before him at the trial he did not act upon it. I will give a familiar illustration. Suppose a man brings an action against a newspaper for libel, in which he gets

the verdict with 40*s.* damages; and the judge holds that the plaintiff had good cause for bringing the action, the jury having found not the contemptuous verdict of a farthing, but having given 40*s.* damages; and the judge therefore gives the plaintiff his costs. Then suppose that the same plaintiff brings another action against another newspaper for the same libel and obtains a verdict with 40*s.* damages; and that this second action is unnecessary and wanton, but that the judge, through no fault of the defendant, knows nothing of the former action, and has not materials before him to influence his judgment as to costs, and declines to make any order. I think that under those circumstances it would not be reasonable to say that the Court should not have jurisdiction to deal with the costs on new materials before them which possibly were not known to the defendant, or which for some reason or another, where there was no impropriety on his part, were not brought before the judge at the trial.

It seems to me there are two classes of cases where it is desirable the Court should have jurisdiction; one, where the event cannot be known by the judge at the trial, and therefore where he could not possibly say whether good cause was shewn to him; and another, where the event might be known to him at the trial, but where there might be some collateral circumstances which, if brought before him, might possibly have altered his opinion, but which were not brought before him then because they were not known, or for some other good reason, and which would be sufficient cause to deprive the successful party of his costs of the action. It seems to me, therefore, that those words, "or the Court," are necessary.

As matter of construction, I think it is manifest that a power is given to the Court independently of and other than that given by way of appeal from the judge, or where the case is brought before the Court on a new trial.

I desire to make a remark about the application being made at the trial for good cause. If I were to speculate upon it, I should not think it could have been the intention of the legislature that the Court should order costs only upon such materials as the judge might have acted upon; if the action were for slander and the damages were a farthing, there might be such good cause that the

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judge at the trial might act upon it. I do not think that these words, "or the Court shall otherwise order," were inserted for the purpose of giving the Court jurisdiction to act upon materials upon which the judge might have acted if he thought fit, but that they were put in to give the Court an independent power, and they are also comprehensive enough to include a case where the judge might have acted if he had thought fit, but did not, and consequently practically they give a power of appeal from him; and the Court has the power, which in this case it has exercised, of exercising that original jurisdiction over costs which is given in the order of the Act of Parliament. I quite agree also that no Court, in acting upon that order, ought to do otherwise than consider that there was a primâ facie case in favour of the litigant in whose favour the event was; but it seems to me the effect of Order LV. is this, a general discretion over costs, a general direction that the costs are to follow the event where there is a trial by a jury, unless upon application made at the trial for good cause shewn the judge shall otherwise order, the effect of which is to take away the discretion of the Court and to put in its place the discretion of the judge in case of good cause being shewn to him; but there is a renewal of the discretion of the Court by the words "or the Court shall otherwise order," subject to this indeed, which is not expressed, but is the spirit and intention, that the Court shall not otherwise order except where upon consideration there is something to induce them to overrule that presumption which the legislature has declared in favour of the litigant, who has had a cause tried before a jury and in whose favour the event has been decided.

One word as to the Appellate Jurisdiction Act. To my mind that is clearly discretionary. There is nothing peremptory in it, and the words, "as far as practical," seem to me to corroborate that view. If not, this somewhat inconsistent consequence would follow, that the judge at the trial is only to deprive of costs for good cause shewn, whereas by these six concluding words, "as the Court shall otherwise order," when he ceases to be the judge at the trial, he has an original discretion to act, as he might have done even if those words were not there. Possibly that may be so.

I think that these appeals ought to be dismissed.

BAGGALLAY, L.J. As I understand Thesiger, L.J., agrees in the opinion expressed by Bramwell, L.J., that these appeals should be dismissed, it is immaterial to the result what view I may entertain upon the subject, but I am bound to say that during the argument I have entertained doubts as to the jurisdiction of the divisional Courts in the two cases from which these appeals have been brought, and that those doubts have not been wholly removed. At the same time, I find so great a concurrence of opinion by so many judges in cases not differing in principle from those now under our consideration, that I feel satisfied my doubts must be unfounded, although at the present moment I am not exactly in a position to say I am quite satisfied. I feel, therefore, that I cannot go so far as to say I dissent from the order it is proposed to make on these appeals.

THESIGER, L.J. In this case we have to deal with two appeals from judgments of divisional Courts, both of which divisional Courts have held that they have an original jurisdiction in regard to costs, where an issue or action has been tried before a jury, and they have exercised their discretion in both cases to deprive the respective plaintiffs of their costs. I am of opinion that they have that original jurisdiction, and that they have a discretion in the matter, with which discretion we have no power to interfere.

The main question in the case turns upon the construction which has been put upon Order LV. I confess that that Order is not altogether free from doubt, and during the argument I have myself from time to time entertained doubts as to what is its proper construction. But at the present moment those doubts have been cleared up, and I entirely concur with the views that have been expressed by Bramwell, L.J. The order in question commences by making an alteration at all events as regards causes tried in the Common Law Divisions of the High Court of Justice, or rather causes, to use the old expression, tried at common law, and it commences with a general provision "that subject to the provisions of the Act the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." That is the general rule, and so far, of course, there is no exception to the rule, and that being the general rule, s. 49 of the Judicature

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Act of 1873 is applicable. That section provides "that no order made by the High Court of Justice, or any judge thereof, as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or judge making such order." Primâ facie, therefore, the costs are in the discretion of the Court or judge, and primâ facie there is no appeal against any exercise of their discretion. But exceptions are contained in this order that we have to construe. The first of these exceptions is one that relates to certain rules which have been acted on by the Courts of Equity previous to the Judicature Acts, and under which trustees, mortgagees, and other persons have their rights preserved by this order. The next exception which is made is one which has reference to the Common Law Divisions of the High Court of Justice. That is contained in a proviso "that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried, or the Court, shall otherwise order." In the first place, it has been contended on the part of the plaintiffs that this proviso does not constitute two tribunals, each of which has a primary and original jurisdiction, but gives the jurisdiction to the judge at the trial, with an appeal to the Court against his decision. I think that that contention is clearly not maintainable. I put aside the reasons against it, although there are several reasons, some of which have been adverted to by Bramwell, L.J.; for I prefer to rely upon the simple construction of the words, and I do not myself see how it can be contended that those words can mean anything more than this, that there are two alternative tribunals, each of which has a primary or original jurisdiction, and not one tribunal with a primary or original jurisdiction, and another tribunal to which is given jurisdiction by way of appeal.

If that contention were right it would involve, first, doing injustice to the ordinary and literal grammatical construction, and would be giving the words the meaning, "unless upon application to the judge or the Court," and therefore to a higher tribunal, and in addition to that it would involve inserting the words "or the Court by way of appeal." I also think, for another reason, that they do not mean by way of appeal, for there might be cases in

which the ultimate event would be decided by the Court and not by the judge, and consequently that there must be some primary jurisdiction given to the Court.

Then, assuming that contention not to be maintainable, the plaintiffs in both cases argued that both the judge and the Court are bound by certain conditions which are mentioned in this particular proviso; in other words, that the expression "upon application made at the trial for good cause shewn," is applicable not only to the judge before whom such action or issue is tried, but also to the Court, which is ex hypothesi to have also an original jurisdiction. I am of opinion that this contention, again, is not maintainable. I quite agree that grammatically the expression to which I have alluded may apply to both limbs of this sentence. Possibly, grammatically, it would more naturally apply to both limbs of the sentence than to one, but on the other hand, if in reading the words "upon application made at the trial for good cause shewn, the judge before whom such action or issue is tried, or the Court, shall otherwise order," the words "before whom such action or issue is tried," were to be struck out, the sentence would really be reduced to an absurdity, for it would be this, "upon application made at the trial for good cause shewn, the judge or the Court," which, ex hypothesi, cannot be at the trial "shall otherwise order." Therefore it seems to me the real and proper reading of this latter part of the order is this, "unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried"—that part of the sentence stopping at those words—"or the Court shall otherwise order."

But then it was said, and it was this branch of the argument which for some time raised a doubt in my mind, "It may be so, but the meaning of the order is, that the Court is only to have jurisdiction over the costs in cases where the Court has seisin of the action itself and, in point of fact, is the tribunal by whom the event ultimately is determined." There again I cannot, after having heard the whole of the arguments, agree in that contention. In the first place, it again involves the insertion of words to the effect "the Court which has seisin of the action or which finally

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determines the event." Those who drew this order had before them no doubt matters of that kind, because where they are dealing with the judge they put in the words "upon application made at the trial for good cause shewn, the judge before whom such action or issue is tried," and, if they had intended to limit the jurisdiction of the Court to cases in which they had an actual jurisdiction over the event of the cause, I think one might fairly have expected that some words of the same kind would have been introduced, but there are no such words.

Therefore it seems to me that while the legislature has provided that there shall be, as regards cases tried by a jury, an exception that the costs shall, as a general rule, follow the event of the cause, at the same time it has given the unsuccessful party the right to go to the judge at the trial to deprive the successful party of the costs for good cause shewn, but has left the general rule as regards the High Courts of Justice untouched, and says, notwithstanding this exception, we still leave the matter to the discretion of the High Court, and therefore if the judge has not been applied to, has not made any order and has not deprived the successful party of his costs, still the High Court shall have jurisdiction to deal with the matter, and if it deals with the matter it has a discretion, with which discretion no Court has a right to interfere, looking to the provisions of s. 49 of the Act of 1873. That would be my opinion if the matter were untouched by authority, but it is confirmed by the views which have been expressed by the judges upon the point. It is perfectly true that in *Baker* v. *Oakes* (1) the point was not the point for decision; but it is equally true that both Cockburn, C.J., and Brett, L.J., did express opinions favourable to the view I have now expressed. In the case of *General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.* (2) the point was raised, although ultimately it was unnecessary to decide it. Huddleston, B., did express in very clear and distinct language a view also to the same effect as that which the Court is now expressing, and Kelly, C.B., who at that time declined to give any opinion on the point, has given an opinion on it, in one of the cases now the subject of appeal; and, finally, we have the judges in *Myers*

(1) 2 Q. B. D. 171. (2) 2 Ex. D. 467.

v. *Defries* and three judges in four other cases that came before them giving their considered opinions upon the point.

As regards the Appellate Jurisdiction Act (39 & 40 Vict. c. 59), I think, looking at the words, it is clear that the legislature did not intend to bind the Court by a hard and fast rule to decide that the judge who tried the cause shall deal with all proceedings subsequently, although it has intimated a very strong direction to that effect, which direction in most cases no doubt is to be followed, but at the same time section 17 states that the direction should be so only where practicable and convenient; and it seems to me neither practicable nor convenient in all cases that the judge at the trial should be the person to decide this question of costs.

Lastly, there is this one remaining point which arises in *Siddons* v. *Lawrence*. It is said there was final judgment signed and the costs taxed. That may be so. It may be an excellent reason for the Court not interfering at such a late stage of the proceedings, but, at the same time, if we are right in holding that the discretion given to the High Court is an absolute discretion, it follows we have no right to interfere with that discretion, although, under the particular circumstances of the case, we might think that the order ought not to have been made. I do not say in this case that is my opinion, for it is entirely unnecessary to consider it.

Appeals dismissed.

Solicitors:—

In *Myers* v. *Defries*:

G. H. & S. Brandon, for plaintiff.

J. Hands, for defendants.

In *Siddons* v. *Lawrence*:

Beaumont & Warren, for plaintiff.

Percy R. T. Toynbee, for defendant.

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[IN THE COURT OF APPEAL.]

HIORT AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Damages, Measure of—Conversion.

The defendants, as warehousemen, held for the plaintiffs corn belonging to them. G., an agent of the plaintiffs, obtained sixty quarters from the defendants, promising to forward them a delivery order from the plaintiffs. T. subsequently contracted to purchase sixty quarters of corn from the plaintiffs, and having obtained from the plaintiffs a delivery order to himself, endorsed it to G. who forwarded it to the defendants as the delivery order which he had promised to send to them. T. was unable to pay for the corn, and G. never accounted to the plaintiffs for the price of the sixty quarters of corn which G. had obtained:—

Held (overruling the Exchequer Division), by Bramwell and Thesiger, L.JJ., that although there had been a conversion of the sixty quarters of corn by the defendants, the plaintiffs were entitled to only nominal damages.

By Baggallay, L.J., that plaintiffs had not been damnified, and were not entitled to any damages.

SPECIAL CASE stated by consent.

The plaintiffs were corn and grain merchants, carrying on their business at Hull and other places.

The defendants are a railway company and carriers of goods, having a station and warehouses at Birmingham.

The plaintiffs employed at Birmingham a person of the name of George Grimmett as their broker and agent, to sell grain for them in the Birmingham district; he also collected some of the accounts for them, and remitted them, when collected, to the plaintiffs by his own cheque. But the accounts he was directed to collect were generally from customers who had bought grain from the plaintiffs without paying for the previous purchase.

The plaintiffs from time to time forwarded from Hull, per North Eastern Railway Company, large quantities of grain, addressed "to our order" (i.e., the plaintiffs' order) at the defendants' station at Birmingham, and the defendants, upon the receipt of such grain, sent to the plaintiffs at Hull an advice note, the material contents of which are:

"The London and North Western Railway Company give public notice that no claim for loss or damage for which they may be liable

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will be allowed, unless the same be made within three days after delivery of the goods, such delivery to be considered complete when notice of arrival is sent to the consignee, or, if the goods be carted by the company, when they are unloaded at the door of the consignee's place of abode or business. That all goods conveyed, but which the company have not undertaken to deliver, must be removed from the company's trucks within forty-eight hours after notice of arrival is sent to consignee, or they will, after the expiration of that time, be subject to an additional charge beyond the amount due per carriage thereof of 3s. per truck per day, or part of a day, for demurrage of such truck, and be held by the company, not as common carriers, but as warehousemen at owner's sole risk.—Advice of goods—Messrs. Hiort & Brochmer. The undermentioned goods consigned to you having arrived at this station, I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and now held by the company not as common carriers, but as warehousemen, at the owner's sole risk, and subject to the usual warehouse charges in addition to the charges now advised.

"For the London and North Western Railway Company,

(Signed) "W. J. Nicholas."

Then followed the name of the firm to whom the goods were consigned, the description of goods, the marks, weight, and rate of carriage, and the total amount to be paid.

When the plaintiffs forwarded grain to Birmingham, as mentioned in the last paragraph, G. Grimmett used to take samples for the purpose of effecting sales for the plaintiffs, and in some instances had samples sent to him from Hull, and upon effecting such sales he, in due course, communicated to the plaintiffs the names of the buyers, the quantity sold, the quality, the kind, and the price; and the plaintiffs thereupon made out an invoice, and forwarded it with a delivery order upon the defendants to the purchaser, upon which he or his transferree obtained delivery from the defendants. The form of the delivery order, which was partly in print and partly in writing, was—"32, High Street, Hull.—London and North Western Railway Company, at Birmingham.—Deliver to (and then followed the description, quantity, and kind of grain) ex lots lying to our order."

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Occasionally the delivery orders were sent direct to the defendants, with a letter informing them that G. Grimmett had requested the plaintiffs to do so.

On the 8th of February, 1873, the manager of the defendants' goods department at Birmingham wrote to the plaintiffs: "We are receiving large consignments of oats and barley to your order here, and Mr. Grimmett frequently produces letters from you to him for the sale of the grain. Will you give us a standing order to deliver any of the grain that may be standing here to your order upon receipt of Mr. Grimmett's instructions." To this letter the plaintiffs replied: "We decline to give the standing order that you suggest, for this reason, that we purposely send grain forwarded to our order that we may the better be able to control the amount of credit given to each customer, as it is often not advisable for us to allow sales of grain to be delivered immediately, when overdue accounts are at the same time standing open, for this reason you will oblige by acting only on our transfer orders."

In June, 1873, it was discovered by the plaintiffs that between January, 1872, and June, 1873, G. Grimmett had been acting fraudulently, and had obtained large quantities of grain from the defendants, which the defendants delivered before they received the order of the plaintiffs.

This was done in the following manner: G. Grimmett would make sales to persons in his own employ, and in some instances fictitious sales to persons who did not exist, he would then present to the defendants orders for delivery, sometimes signed ostensibly by those persons, and sometimes signed by such person and indorsed by him for delivery to himself; and sometimes orders signed by himself for the plaintiffs, he not having authority to do so from the plaintiffs.

Between January, 1872, and June, 1873, the defendants delivered to the orders in the last paragraph mentioned, large quantities of grain before they received any order from the plaintiffs, but upon the orders of G. Grimmett, or persons to whom he professed to have sold grain, and G. Grimmett received the grain. In all those cases the grain was subsequently paid for by G. Grimmett.

In other cases there was a predelivery by the defendants before they received the plaintiffs' orders, and none of them have been satisfied by payment. The value of the corn thus predelivered amounts to 230*l.*, which the plaintiffs claim as damages.

The case then set out the particulars of the predelivery, of which it is necessary only to state one instance, all the others being similar in character.

On the 19th of November, 1872, fifty quarters of oats, and on the 22nd of November, 1872, ten quarters of oats, of the value together of 79*l.*, were delivered by the defendants on the orders of George Grimmett in favour of J. Sheldon as to fifty quarters; and in favour of W. J. Reeve as to ten quarters. On the 24th of November the defendants received the plaintiffs' delivery order for the same in favour of George Tarpler, the order then being indorsed over to George Grimmett by George Tarpler. Tarpler was and is debited in the plaintiffs' books with the price of the corn, 79*l.*, and he has not paid any part of it.

The plaintiffs at the time when they gave the orders and made the debits and received payments as mentioned had no knowledge of the facts that the defendants had parted with the goods before they had received the plaintiffs' orders.

The plaintiffs seek to recover 230*l.* and interest for the value of the corn which the defendants have predelivered, and for which the plaintiffs have not been paid.

The case was argued on the 21st of November, 1877, by Gully, Q.C., and Sutton, for the plaintiffs, and Dugdale for the defendants. The Exchequer Division (Kelly, C.B., and Cleasby, B.), gave judgment for the defendants.

The plaintiffs appealed.

May 1. *Gully, Q.C.*, and *Sutton*, for the plaintiffs. The defendants held the corn as bailees for the plaintiffs. Without any authority from the plaintiffs they delivered some of that corn to two persons, Sheldon and Reeve; they therefore converted the plaintiffs' goods to their use, and on the 23rd of November, 1872, the plaintiffs had a complete cause of action against the defendants. Then has anything occurred since to destroy that right of action? It will be said that because the plaintiffs had sold this

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corn to Tarpler, and given him a delivery order on the defendants for it, which order Tarpler had indorsed to Grimmett, who lodged it with the defendants, the plaintiffs' cause of action is destroyed. How can a cause of action once vested in the plaintiffs be destroyed by some subsequent event? It cannot be that merely giving orders for the delivery of goods to a third person, who the plaintiffs are advised is a bonâ fide purchaser, where there are no goods on which the order can operate (for the defendants had already parted with them), can affect the right of action already vested. If on the 23rd of November the plaintiffs had demanded the corn from the defendants they could not have complied with the demand, and if the plaintiffs had then sued them they would have recovered its full value. The cause of action is the same at the time the writ issued as it was on the 23rd of November, 1872. It may, however, be said that the act of misdelivery was ratified by the order subsequently given to Tarpler, but the plaintiffs never knew of the conversion until a short time before the action was brought, how can they be said to have ratified an act of which they knew nothing?

[BRAMWELL, L.J. What pecuniary damage have the plaintiffs sustained by reason of the irregular deliveries which they would not have sustained if the goods had not been so delivered?]

The plaintiffs have lost the goods.

[BRAMWELL, L.J. They would have been equally lost to the plaintiffs if they had been delivered under the subsequent orders.]

The cause of action having once vested, no subsequent act of the defendants could deprive the plaintiffs of their right of action and damages for the conversion.

[BRAMWELL, L.J. So that if the goods had been delivered to the plaintiffs' nominee, who had paid for them, it is equally a conversion, and the plaintiffs can maintain their action.]

Trover would lie. As a general rule in an action of trover the plaintiff recovers the full value of the goods; the only exceptions to that rule are where the defendant has some special property in the goods; in such cases the measure of damages may be something less than the full value. But in those cases the transaction is one which arises immediately between the parties. This general rule has recently been acted on in *Mulliner*

v. *Florence*. (1) There an innkeeper had a lien on certain horses; he sold them, and he was held liable for their full value. All the cases are collected in the judgment of Denman, J., in *Johnson* v. *Lancashire & Yorkshire Ry. Co.* (2)

Dugdale (*Russell Griffiths*, with him), for the defendants. The plaintiffs are not entitled to any damages, not even to nominal damages. There has been no misdelivery; the corn has been delivered to the order of the plaintiffs, and they cannot complain that their order has been carried out merely because there was a predelivery. The defendants have done that which gives the plaintiffs a right of action against Tarpler for goods sold and delivered. If there has been a conversion, and the plaintiffs are entitled to recover, they will recover twice; once against the plaintiffs for damages of the conversion, and a second time on the contract of sale against Tarpler. But there has been no conversion. The goods have been delivered to the persons who are entitled to them and to whom the plaintiffs intended they should be delivered. How can it be said that the plaintiffs have been deprived of their goods when they have been delivered according to their own order? That order has been substantially complied with; whether the goods were delivered a day before or a day after the order was made is immaterial. The plaintiffs' remedy is against Tarpler, but as he is unable to pay, they seek to recover the price of the goods from the defendants.

Gully, Q.C., in reply.

Cur. adv. vult.

May 13. The following judgments were delivered:—

BRAMWELL, L.J. The judgment in the Court below is for the defendants. I am of opinion it ought to be entered for the plaintiffs with nominal damages. Substantially that is a judgment for the defendants, for the consequence of giving the plaintiffs nominal damages and giving them nothing, in my mind, would be the same. I do not desire to labour a matter which, according to my own statement, is one of no importance. But I cannot state my opinion that the plaintiffs are not entitled to substantial damages without stating why I think they are entitled to nominal damages. Before

(1) 3 Q. B. D. 484. (2) 3 C. P. D. 499, 506.

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the Judicature Acts the plaintiffs would have had to establish that the defendants had been guilty of a conversion. The Judicature Acts have not altered the law. It is true, that in the forms given in the Appendix to the Rules (1) the form in lieu of the old count in trover, or for conversion, is "for wrongfully depriving the plaintiff of goods, household furniture, &c." But the substance of the law remains the same, although there has been an alteration in the mode of stating it. It becomes necessary, therefore, to see whether, before the passing of the Judicature Acts, there would have been a conversion. I have frequently stated that I never did understand with precision what was a conversion; where an article is actually destroyed and consumed for the benefit of the wrong-doer, undoubtedly in that case there has been a conversion not only according to law but according to the ordinary use of the term; but conversion afterwards was in some cases held to be something so unlike a conversion in fact that I find it impossible to give an exhaustive description as to what was or was not a conversion. I feel a difficulty in this matter, which I have referred to in several judgments I have delivered, and in which I was in the minority, but which were upheld in the Exchequer Chamber. *Burroughes* v. *Bayne* (2) and *Pillott* v. *Wilkinson* (3) are cases in which this point has been discussed, and I had occasion to express this opinion. But, speaking with reserve, I think the act of the defendants, before the passing of the Judicature Acts, would have been a conversion, and is so since. It is held that if a man disposes of property—and in law he did, if he without authority delivered it to somebody not entitled to receive it—he might be charged with converting it to his own use. A misdelivery by a carrier was a conversion; I cannot see, therefore, why a misdelivery by a warehouseman is not a conversion; so that if nothing had been done in this case but to deliver these goods to Grimmett's nominees—that is to say, if there had been no subsequent order of the plaintiffs—there would be a misdelivery, and consequently, as well as I can make out, a conversion. I also think that, technically, there was a cause of

(1) See Appendix A, pt. ii. sect. 4.

(2) 5 H. & N. 296; 29 L. J. (Ex.) 185.

(3) 2 H. & C. 72; 32 L. J. (Ex.) 201; Ex. Ch.; 3 H. & C. 345; 34 L. J. (Ex.) 22.

action against the defendants for breach of duty as warehousemen in delivering the goods without any authority. I think, therefore, that the plaintiffs are entitled to nominal damages, because a conversion cannot be purged, and if a defendant is guilty of conversion he must pay some damages. A return of the goods undoubtedly might be shewn to reduce the damages in the case of a conversion, not only where the owner voluntarily received back the goods, but where he took them back against his will. In an action of trover or conversion the practice was for a defendant to apply to the Court for a stay of proceedings on the delivery up of the goods, and on payment of nominal damages and costs; but if the plaintiff refused to accept delivery, and insisted on proceeding with his action for substantial damages, he did so at his peril, and if he failed to get substantial damages he was made to pay the costs of the action. It is clear, therefore, that on the return of the goods the plaintiff would recover, not their value, but the damages he had sustained by the wrongful act, which was called the conversion. Let me apply that reasoning to the present case. The goods have been delivered by the defendants to Grimmett's order; afterwards the plaintiffs gave a delivery order, requiring the goods to be delivered to Tarpler's order; Tarpler hands that order to Grimmett, who lodges the order with the defendants, Grimmett could not therefore, ask of the defendants that the goods should be delivered to him, because they had been already delivered to his nominee, the person to whom he requested that they might be delivered; if he made any claim against the defendants he would be met with the answer, the goods have been delivered as requested by you, and you have no title to them. Of course Tarpler can make no claim against the defendants, because Tarpler requested that the goods should be delivered to his order. If Grimmett is silenced and satisfied by what has taken place, so likewise is Tarpler. The plaintiffs are entitled to maintain an action against Tarpler, and if they sued him for goods sold and delivered, he would have no defence, because if he were to say the goods were never delivered to him, the answer would be that they were delivered to his nominee, which is equivalent to a delivery to him, and therefore he is liable for goods sold and delivered. If the plaintiffs' contention is right, the plaintiffs can allege, in this

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action, that the goods belong to them, and the defendants have converted them to their own use; and in an action against Tarpler, that the goods are not theirs, but Tarpler's, for they have been delivered to him, and they are entitled to the price from him.

For these considerations I think that what took place is equivalent to a return of the goods. I do not mean to say it is a return, but it is in the nature of a return of the goods, and the same reason for reducing the damages to a nominal amount applies. Let me suppose this case: that on the order being lodged with the defendants by Grimmett they were to ask him if he had any authority to give the first order, and he were to reply he had no authority, and the defendants were to require Grimmett to bring back the goods, and they were to redeliver them to him. In that case it is obvious there would have been a redelivery to the plaintiffs, because, if there had been a redelivery to the defendants to hold them on their behalf, it would not be necessary to go through such a ceremony. The question is not whether, at the time of action brought, the property was in the plaintiffs; in my opinion the question is, was the property in the plaintiffs at the time of the wrongful act, assuming the wrongful act to have been a conversion?

I am of opinion that either the plaintiffs cannot maintain this action, or if they can maintain it, they are entitled only to nominal damages, and therefore they ought to pay the costs.

BAGGALLAY, L.J. The facts according to my view of the case are, certain corn was in the custody of the defendants, to be delivered by them to the order of the plaintiffs, and to their order only.

On the 19th and the 22nd of November, 1872, the company delivered out the corn to the order of Grimmett; Grimmett was the agent of the plaintiffs for certain purposes, but he was not their agent as regards giving orders for the delivery of corn. On the 24th of November an order was received by the defendants for the delivery of the same parcel of corn to Tarpler and indorsed by Tarpler to Grimmett. That was an order which the company were bound to act on. They would have been bound to

deliver the goods on the 24th of November to Grimmett's order, if they had not previously done so; but they had previously, by anticipation, on the 19th of November, delivered the goods which they would have been bound to detain on the 24th. On that view of the case it appears to me to be clear that no substantial damages can be recovered in this action.

As regards the question of nominal damages, I speak with great hesitation in expressing an opinion which differs from that of the other members of the court upon the law relating to the action of trover and conversion; but it appears to me that the case is one for substantial damages or no damages. Possibly there might have been a case for damages in respect of the interval between the 19th of November and 24th of November, but no claim is made for that in this action. The claim is simply one for substantial damages, 230*l.*, the value of the several parcels of corn. This matter appears to me to have been under consideration in the Exchequer Division, and they were of opinion not only was there no case for substantial damages, but no case for any damages, not even nominal. Fortified by this authority, I am bound to say that the judgment of the Exchequer Division is right.

THESIGER, L.J. I have entertained some doubt whether this action can be maintained even for nominal damages. But upon consideration I think it can for this reason. Stripping the case of all accidental circumstances the facts are, that the defendants, being in possession of certain goods of the plaintiffs, as bailees, were bound to keep them until they obtained the authority of the plaintiffs, the bailors, to deliver them; notwithstanding that duty they delivered them to certain persons, without any order from the plaintiffs: it is true that the delivery was made in the anticipation that subsequently a delivery order would be received from the plaintiffs, and in point of fact it was received a few days afterwards. I am of opinion, however, that the previous unauthorized act, whether it is called a misdelivery or a predelivery, whether it constitutes technically speaking a conversion, or only a breach of the contract of bailment, or of the duties which flow from the bailment, was a wrongful act in respect of which a right

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of action vested at once in the plaintiffs, and that the right of action once vested was not divested by the plaintiffs afterwards giving the delivery order under which the defendants might have delivered the goods, and which, in truth, had been then already delivered. I think that the unauthorized act, whether it be a conversion, or whether it be a breach of contract, or a breach of duty did vest the right of action, and that there was sufficient damage in the eyes of the law to enable the plaintiffs to sue, for this reason, that they were for some days deprived of the control of their goods, to which they were entitled by their contract with the defendants, and the law presumes a damage in respect of that unlawful act. The question, however, assumes a different aspect when we consider what is the amount of damages to be recovered. The plaintiffs contend where a third person, whom the bailee may trust, and who has had dealings both with the bailee and bailor, informs the bailee that a delivery order for the delivery of goods to certain persons will in a few days be forwarded by the bailor to the bailee, and asks the latter for the convenience of all parties to deliver the goods to the persons designated, and the bailee in anticipation of the order in perfect good faith complies with the request, that although the order is afterwards forwarded by the bailor, yet they, as plaintiffs in an action of trover, are entitled to recover against the bailee the full price of the goods delivered in anticipation of the order. The mere statement of that proposition shews that it cannot be maintained; and I think that there is a complete answer to it. If it is said that the unauthorized act constituted a breach of the contract of bailment, or a breach of duty which flows from the bailment, then it follows that the bailors can only recover the damages which have resulted from the unauthorized act which constitutes that breach of contract or duty, and here it is obvious that no damages have resulted from the act of the defendants. If they had not delivered these goods at the respective dates at which they were delivered, they would have been bound by virtue of the delivery order issued subsequently by the plaintiffs to have delivered them exactly in the same way, and to the persons to whom they were delivered. The damage has not been sustained by the delivery by the defendants, but in consequence of the plaintiffs selling their goods and

authorizing the delivery of them to persons, who are liable to the plaintiffs for the price, and treated by them as liable down to the present time, but who have not paid for them.

It is said that there is some magic in the term "conversion," and the argument for the plaintiffs may be put thus: the unauthorized delivery constituted conversion; the plaintiffs have never received their goods; consequently the damage which they are entitled to recover in respect of that conversion is the full value of the goods. That argument is not sound. No doubt the action of trover has been surrounded by technicalities, which may have in some instances worked injustice. I think, however, of late the tendency of the Courts has been to treat this action with more common sense than it had been previously treated. Just as in other actions of tort it is held that a person to whom a wrong has been done can only recover the damages which flow from the wrong; so in an action of trover it is the tendency of the Courts to apply the same rule. I will refer in support of this view to the cases of *Brierly* v. *Kendall* (1) and *Chinery* v. *Viall* (2), where it was held that the person whose goods have been converted was not entitled to recover their full value. But if the technicalities which surround the action of trover are relied upon, the plaintiffs are met with a technical rule, or, indeed, with a substantial objection; if plaintiffs bring trover and recover the full value of the goods claimed, it follows from the verdict in their favour that the property in the goods is upon the satisfaction of the judgment transferred to the defendants. No doubt there are cases in which the defendant, although bound to pay the full value of the goods, yet may, owing to the way in which he has disposed of the goods, be unable to retain the goods. A plaintiff claiming goods is assumed, if he recover the full value, to be in a position to convey or transfer to the defendant the dominion over and property in the goods, so far as regards any act of his own. If that be so, how stands the matter? There was an act of conversion which gave the plaintiffs a right of action, and subsequent to that act of conversion there was a valid transfer of the property in the goods from the plaintiffs to some other person, who was entitled to hold the goods and bound

(1) 17 Q. B. 937. (2) 5 H. & N. 288; 29 L. J. (Ex.) 180.

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to pay their price to the plaintiffs; then the plaintiffs clearly had no dominion over these goods, no property in them which they were able to transfer to the defendants upon the judgment being satisfied. It is true that the plaintiffs had a property in the goods between the time of the act of unauthorized delivery and the time when they did authorize the delivery, that is, transferred the property in the goods to the third person. It appears to me, therefore, to follow from the ordinary rules which are applicable to actions of trover that the plaintiffs are entitled to recover damages only for the deprivation of their control over the goods from the time of the unauthorized delivery; but inasmuch as it is admitted that during that period the plaintiffs sustained no damage they can only recover nominal damages.

As the substantial question raised in this special case is which of the parties shall bear the consequences of Grimmett's frauds, and this Court is of opinion that the plaintiffs ought to bear them, I think that they ought also to bear the costs of the action in which they have substantially failed.

Judgment reversed, and entered for the plaintiffs with damages one shilling, plaintiffs to pay the costs of the action.

Solicitors for plaintiffs: *Chester & Co., and Arnold & Son, Birmingham.*

Solicitor for defendants: *R. F. Roberts.*

[IN THE COURT OF APPEAL.]

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June 17.

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SEDGWICK *v.* AHEARN.

Landlord and Tenant—Notice to Quit.

The defendant was tenant to the plaintiff from year to year of a shop and premises; the plaintiff gave the defendant notice in writing to quit on a day terminating the tenancy. The notice contained the following clause: "And I hereby further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly, in advance":—

Held, by Bramwell and Cotton, L.JJ., Brett, L.J., dissenting, that the notice to quit being otherwise sufficient, it was not rendered invalid by the additional clause.

In the first action the plaintiff sued for the recovery of a shop, premises, and show-rooms.

In the second, the plaintiff sued the plaintiff in the first action for a breach of a contract to give possession of the premises sought to be recovered in the first action.

These actions were tried before Lopes, J., at the Liverpool assizes, and the facts were as follows:—On the 1st of May, 1874, the defendant Bellman became tenant from year to year to Ahearn of the premises in question at a rent of 76*l.*, which before the year 1877 was increased to 96*l.* In 1877, the plaintiff Sedgwick offered Ahearn a larger rent; thereupon Ahearn told Bellman that an increased rent had been offered, but that he would give him the preference if he would take the premises for a term of years at the increased rent. Bellman declined this proposal, and on the 24th of August, 1877, Ahearn agreed to let the premises to Sedgwick for the term of seven years for 150*l.* a year, to commence from the time when Ahearn could obtain possession of them. On the 29th of October, 1877, Ahearn gave Bellman a written notice to quit in the following terms: "I hereby give you notice to quit and deliver up possession of the shop, premises, and show-rooms situate and being 20, Moss Street, Liverpool, and now held by you as tenant from me on or before the 1st day of May, 1878. And I hereby further give you notice that should you retain possession of the premises after the date before mentioned the annual

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rental of the premises now held by you from me will be 160*l.*, payable quarterly, in advance." Bellman refused to pay any increased rent, and did not give up possession of the premises on the 1st of May, and on the 13th of May Ahearn commenced the action against him for the recovery of the premises. Sedgwick also brought an action against Ahearn for breach of his agreement, alleging that he might have obtained possession if he had given a proper notice to Bellman, and that he gave no such notice. The learned judge was of opinion that the notice to quit was invalid, on the ground that the latter clause of the notice gave Bellman the option of remaining tenant upon fresh terms, and that the case of *Doe* v. *Jackson* (1) was distinguishable; and therefore in the action between *Ahearn* v. *Bellman* for the recovery of the premises he directed judgment to be entered for the defendant; and in the action between *Sedgwick* v. *Ahearn* he directed judgment to be entered for the plaintiff for 25*l.*, the agreed amount of damages.

Ahearn appealed.

C. Russell, Q.C., and *T. H. James*, for Ahearn. The first clause of the notice to quit is clear and direct in its terms, and is not vitiated by the terms of the second clause. The only authority to be found is *Doe* v. *Jackson* (1), in which the judgments of Lord Mansfield and Willes, J., are in point for Ahearn.

Gully, Q.C., and *French*, for Bellman and Sedgwick. The question is, what is the construction of the notice to quit? It offers to the tenant the option of a new bargain, and is therefore bad. The dictum of Lord Mansfield in *Doe* v. *Jackson* (1) is in point. There is a distinction between the present notice and the one in that case. There the words of the notice were: "I desire you to quit possession at Lady Day, or I shall insist on double rent:" the additional clause merely informed the tenant of the legal consequences of his holding over; but Lord Mansfield pointed out in his judgment that if the notice had really contained the option of a new agreement, and had been "or else that you agree to pay double rent," it would have been bad. That view of the law has been acted on ever since that decision. The notice in this case

(1) Dougl. 175.

in effect says to the tenant "either give up possession or make a new agreement;" it is a notice to go or stay at the tenant's option; it offers a new bargain to the tenant on the terms of an increased rent and a different mode of payment. In fact, notwithstanding the notice, the old tenancy continued in full force, for the payment of an increased rent would not create a new tenancy: *Doe* v. *Geekie*. (1) But assuming that the tenant accepted the terms, and a new tenancy was created, from what time would it commence? from the commencement of the notice to quit, or from the expiration of the old tenancy? These considerations shew that the notice is uncertain and ambiguous: if so it is bad, for all the text-books lay down the law to be that a notice to quit must be clear and unambiguous: Woodfall's Landlord and Tenant, p. 311; Adams on Ejectment, p. 95; Cole on Ejectment, pp. 46, 47.

C. Russell, Q.C., in reply. It is clear law that a notice to determine a tenancy need not be in writing; and it would be a good notice if the landlord said to his tenant, "quit at the expiration of your tenancy," and added "but I am quite willing to consider an offer of a new tenancy on the terms that you pay an increased rent and in advance." How could this latter proposal render the notice bad when it is an expression of the landlord's determination that the subsisting tenancy shall be at an end? The notice is perfectly good.

BRAMWELL, L.J. I am of opinion that these two judgments must be reversed. The question is whether the plaintiff has given a good notice to quit: it is commonly so called, because the effect of it is, that on its expiration the tenant must quit the premises, but it is in reality a notice to determine the tenancy. The notice is, "I hereby give you notice to quit and deliver up possession of the shop, premises, and show-room now held by you as tenant from me on or before the first day of May next, 1878." Nobody can doubt that if the notice had stopped there, it was effectual to determine the tenancy, and was a good notice to quit. But the notice contains this additional clause, "I hereby further give you notice that should you retain possession of the premises after the date before mentioned, the annual rental of the premises

(1) 13 L. J. (Q.B.) 239.

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now held by you from me, will be 160*l.*, payable quarterly, in advance." I am not at all sure that that was not meant as a threat that the tenant would have to pay more rent; but I am inclined to think its more reasonable construction, especially when it contains the words "payable in advance," is that it was an offer, and I think it would have justified the defendant in treating it as an offer upon certain terms, which he might accept. Had he done so, the notice to quit, I think, would have been as efficacious as it was before, and would have put an end to the old tenancy, but there would, at the same time, have been created a new tenancy. I think there would have been no difference if the notice had been given in one letter, and the offer made in another letter at a subsequent time. I cannot understand how it can be said that an offer of a new tenancy in any way affects the validity of the notice to determine the old one; if anything it corroborates it, because it supposes that the old tenancy is gone, otherwise there would be no competency to enter into a new one. I do not think it is a continuation of the tenancy on new terms under the offer, unless the offer had been accepted, and the offer has not been accepted; on the contrary, the defendant expressly sent word that he would not accept the terms that were offered to him. Therefore, even supposing that the old tenancy would have continued if the offer had been accepted; it was not accepted, and consequently the notice to quit was valid, and nothing has occurred to prevent its operation. I am inclined to think that if the defendant had not upon the receipt of the offer accepted it, it would have been in the same condition as any other offer, it would have been an offer made but not accepted; if the offer is interpreted to mean that the tenant need not make up his mind as to whether he would accept the offer until the time arrived for his quitting, it would give him until that time for consideration, and if he continued tenant after that time it would probably be treated as evidence of the acceptance of the offer; but it is unnecessary to consider this question, for the only question is whether the tenancy affected by the notice to quit was terminated, and I am of opinion that it was, and the defendant at the time when the action for the recovery of the premises was brought was not tenant of the plaintiff.

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It is laid down in Woodfall's Landlord and Tenant, and in many other authorities, "A notice to quit must be clear and intelligible"—so must every other notice and every document—then the passage goes on, "a notice to quit should be clear and certain in its terms"—of course it ought, and so ought everything else—"and not ambiguous and not optional." A notice to quit which is optional is not a notice to quit. A notice that a tenant may go or stay is not a notice to go; it is no more a notice to go than it is a notice to stay. "If a notice to quit was in these words, 'I desire you to quit or else that you agree to pay double rent,' the tenant having an option, the notice would not be sufficient. It would not have been sufficient provided he exercised the option to stay." I very much doubt whether it would; however there is the learning of Woodfall on that subject. I will say a word about notices in general. Let us suppose a purchaser were to buy goods, and part of the contract was that the vendor upon receiving notice would send them by the London and North Western or the Great Northern Railway. The purchaser writes to the vendor, "Take notice you are to send the goods by the London and North Western, and my reason for doing that is that their terminus is nearer my place of business, and therefore it will cost me less to cart them home, but if you, the vendor, like to pay me a shilling a ton you may send them by the Great Northern." Would that not be a good notice to send the goods by the London and North Western? Clearly it would, and yet it would give the vendor an option; but if he does not exercise that option he is to send them by the London and North Western. So in this case, unless the tenant does accept the option for a new term it would be a notice to quit the premises. As a matter of reasoning, I cannot bring myself to see the difficulty in this case. It is said that Lord Mansfield has decided this question favourably to the defendant. In my judgment he has done nothing of the sort. Lord Mansfield says, "That the landlord may give the tenant the alternative is clear." What alternative? The alternative of going or staying. The question is, what is the meaning of this notice? If it had contained the option of a new agreement, and had said, for instance, "or else that you agree to pay double rent," the action would not have been supported, that is to say,

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according to the words reported to have been used, the mere offer of a new agreement would prevent the notice being good. That is the conclusion that is drawn from it. I do not draw that conclusion from it. I agree that the ejectment in that case could not have been supported, and for this reason; "I desire you to quit possession, or I shall insist upon double rent;" and the man continued in possession; if there had been an offer of a new tenancy, his continuance in possession would be evidence that he had accepted that offer, and in my judgment that is all that Lord Mansfield means when he says that if the notice had contained the option of a new agreement, or said, "or else that you agreed to pay double rent," the ejectment could not have been supported. Did Lord Mansfield mean to say that if it had contained that offer, and the tenant had said, "I will not accept it; I will not stay upon those terms but will quit," that ejectment could not be supported? I find nothing in Lord Mansfield's judgment that would lead to such a conclusion. Then Lord Mansfield goes on to say, "But the landlord does not mean to offer a new bargain. I think that very point has been settled several years ago, but if it is new, I have no doubt the additional words can only prove the landlord's anxiety to get into possession. It is an emphatical way of enforcing the notice and shewing the tenant that he is in earnest by informing him of the legal consequence if he hold over, but the notice informs him that in such case the landlord will insist on the penalty. It clearly means to refer to the statute." That is how Lord Mansfield deals with this particular case, and says there was no offer; so that taking it that the tenant staying in would have been an acceptance of the offer, if there had been an offer, there was no offer. If he meant to say that an offer would vitiate the notice, in the first place, it was obiter dictum; in the next place, obiter dictum as it was, I agree to it because it means that it was an offer, and an accepted offer, to the tenant staying in possession. Then Willes, J., says, "That the notice is to be considered as having two parts: first, a common notice to quit; secondly, a warning to the tenant of the consequences." There is a notice to quit, and an offer to the tenant that he may make a new bargain if he thinks fit. Then it is said that the law has been understood, and laid down, and acted upon as contended

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for on behalf of the defendant. I cannot think that it has been acted upon. I quite agree that when the law has been laid down and acted upon, especially in cases relating to real property or mercantile contracts, it is not desirable that it should be departed from. I do not hesitate to say that the point raised on behalf of the defendant is to me an entire novelty. I repeat, as a matter of principle, I cannot understand why a tenant is told, "Your tenancy now existing is terminated, and you may enter into a new one if you think fit;" and if he does not think fit to enter into it, the notice is not as good as though it had not contained that offer to enter into a new tenancy. The question appears to me, on principle, unaffected by authority, that the plaintiff was entitled to recover in this action of ejectment, and that he, as a defendant, had a good answer to the second action.

BRETT, L.J. I am of opinion that the notice to quit was bad, and therefore, had no effect in putting an end to the defendant's right to remain in possession of the premises.

This is an action of ejectment, and the plaintiff in ejectment cannot recover unless he has a right to immediate possession. It is brought by a landlord against his tenant. There was a tenancy between the plaintiff and the defendant, a tenancy from year to year, but with an implied power on the part of the landlord to put an end to that tenancy by a certain notice to be given at a certain time. The power so given to the landlord is absolute. It is given to him no doubt by the consent of the tenant, but nevertheless it is an absolute power. It is a power given to one of two persons to a contract to put an end to the contract at his sole will against and contrary to the will of the other, and it has always been held that where such a power is given to a landlord, it is given also conversely to the tenant, and the same reasoning applies. The power must be strictly followed. I cannot agree that the notice is of itself a notice to put an end to the tenancy. It is a notice which is given for the purpose of having that result, but the only notice which can put an end to the tenancy is a notice to quit possession given at a certain time and for a certain time. It is said that if a tenant accepts an offer which is made to him to pay a new rent payable at different times from that formerly payable,

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that then there is a new tenancy, and therefore that the old tenancy is put an end to. As far as I understand, the suggestion is that the old tenancy is put an end to at the time when the notice to quit given to put an end to that tenancy expired. With the greatest deference I differ. The time when the old tenancy would be put an end to, by reason of the parties agreeing to new terms and to a new tenancy, would be the time when that new agreement was made. It is a necessary implication that the moment they have agreed to a new tenancy they have agreed to cancel the old one; and if by a new agreement there is a new tenancy created, at that moment the old one is at an end, even before the expiration of the notice to quit, which was given to put an end to that former tenancy. The sole question, therefore, seems to me to be whether the notice to quit was a good notice; if the notice to quit possession was bad at the time it was given, then the tenant is not called upon to do anything in respect of it. He has a right to disregard it altogether. The contract between them not having been put an end to by his own will, nor in the only way in which it could be terminated against his will, he is entitled to remain in possession, because his tenancy is not at an end; and the plaintiff in ejectment, not being entitled to an immediate possession, cannot recover in ejectment.

Therefore the question seems to me to be whether the notice to quit is good. It is a notice to quit on a certain day; but in the same document, although I do not think that is absolutely material, at the same time a proposition is made to the tenant. That is not a proposition made to the tenant so that he could not do anything afterwards without the consent of the landlord. The proposition is made to him, "You are to go out of possession on the day I tell you, or you may remain in possession if you will do so on certain terms." That certainly as to quitting possession gives him an option; at all events, it was so stated in terms by Lord Mansfield, more than a hundred years ago. Lord Mansfield stated a proposition of law with regard to tenancies and with regard to notices to quit, and he stated that it was a proposition of law which he believed to have been decided before, but which at all events, he decided then as the rule which was to be the governing rule between landlord and tenant:

that if the notice to quit gives the tenant permission to remain in possession if he will accept terms then offered to him it is an optional notice, and an optional notice, as Lord Mansfield says, is a bad notice according to the law of England between landlord and tenant. He says in effect: "That is the rule I have to consider for the purpose of founding my judgment in this case, and the only way in which I can hold that the notice in the case before me is a good notice, is to say that it does not give that option. If it did give that option, I should be obliged to say that the ejectment could not be maintained. I hold that it can be maintained, because the notice before me does not give that option, but only gives a notice to quit at a proper time and mentions that which is the legal consequence if the tenant holds over." That Lord Mansfield meant to say that the notice was a bad notice, if it was in the terms which he suggested, I cannot doubt. He says so in very terms, and he only avoids the application of the rule by saying that the notice there did not come within the rule. But how has it been understood? It is admitted that it has been understood in the sense in which it is stated by every text-writer, whose books have been received as valuable books in the law from that time to the present. To say that Woodfall states a mere truism which is of no value, is not the right way to deal with such an authority. What Woodfall says is, "a notice to quit should be clear and certain in its terms and not ambiguous." It is said that every notice should be so, but that sentence of Woodfall's points to many cases which have been decided. There have been many cases in which the notices to quit have been uncertain in their terms, and there have been many notices to quit in which the notice has been ambiguous in its terms. But Woodfall goes on: "A notice to quit should be clear and certain in its terms, and not ambiguous or optional;" that is in other words, to say that a notice to quit should not be optional. That does not apply to every other notice. There may be notices which are good although they are optional; but he says in the case of landlord and tenant, a notice to quit possession which is to have the effect of altering the contract at the will of one of the parties must not be "optional." Therefore, if a notice to quit be in these terms, "I desire you to quit or else that you agree to pay double rent,

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the tenant having an option "—what is that option? An option to remain in possession or go out—" the notice would not be sufficient." Then he cites the case before Lord Mansfield, that is to say, he has understood Lord Mansfield to mean and say the very thing which I say I should have thought from the case he did say. Cole on Ejectment, is a book which is always received with respect, and he says the same thing in the same terms. Adams on Ejectment says the same thing. We have it that, more than a hundred years ago, Lord Mansfield stated there was a rule of law applicable to the contract of landlord and tenant, and that rule of law in the sense in which Lord Mansfield meant it, is copied and stated to be the rule of law in every text-book which has been written from that time to this: that is to say in every source to which persons could go in order to see how they are to manage their property in matters which occur from day to day.

My opinion is formed upon a ground which I have had occasion to state more than once, which is this, that where the law has been decided for years with regard to the management of property, as to its daily and constant management, or with regard to the conduct of mercantile or other business, we ought not—whether that decision is right or wrong—to alter it; because, in all probability, although it cannot be proved, there must have been many cases in which the law so laid down has been acted upon. At all events in the particular case the parties would have a right to act upon the law which has been so laid down in every place where they could look for the law, and it seems to me that it is most unjust to come to a decision against a tenant who has acted upon that statement of the law, made in a judicial decision given a hundred years ago. It seems to me that it is most unjust now to question that decision, or to question that uniform current of statement of the law and to affect a man most materially, both as to his property and as to the results of a suit, by stating, at the end of a hundred years, that that which everybody has understood to be held by Lord Mansfield was not held by him, or to state that what was held by Lord Mansfield was bad law. Inasmuch as that decision related to the management of property, just the same as if it had related to the management and conduct

of business, in my opinion it ought not to be altered. It cannot, to my mind, be pretended that this case is really different from the case stated by Lord Mansfield. It is exactly within the rule of law laid down by him as the rule of conduct between landlord and tenant, and therefore, in my opinion, Lopes, J., was right in following the decision of Lord Mansfield, and his judgment ought to be affirmed.

COTTON, L.J. I am of opinion that the plaintiff in this first action is entitled to judgment, and that the judgment appealed from must be reversed.

The question is whether or no the yearly tenancy of the defendant was determined before the action was commenced; as, if it was, the defendant had no title to the possession of the premises. What, then, is a yearly tenancy? It is a tenancy for a year, and so on from year to year, unless either of the parties by notice given in due time determines the tenancy. Anything passing from one to the other in due time, which gives a notice to the other party that the tenancy between them is to be at an end, whether given by the landlord to the tenant or by the tenant to the landlord, puts an end to the tenancy. There is no authority which has been referred to shewing that any special form is required, and in reason or sense no special form is required.

No doubt the notice by which a tenancy is determined is usually called a notice to quit. It is called a notice to quit, I take it, for two reasons: first, that whatever the form of the notice is, unless the tenant gets some new agreement with the landlord which entitles him to continue in possession, the result or consequence of the determination of the tenancy is that he must quit, and if he does not quit, the landlord may treat him as a trespasser. But usually a notice to determine a tenancy is given in the form of a notice to quit; that is to say, that the landlord says to his tenant, "At the end of the current year of your tenancy I shall require you to give up possession and quit;" and, on the other hand, the tenant tells his landlord that he intends to quit. It is not of necessity that the form should be in a certain way, or that of

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necessity after the determination of the tenancy the tenant must quit. He only must do so unless there is some new agreement entered into between him and the landlord, but if there is no new agreement entered into between them after the tenancy from year to year existing when the notice to determine was given has expired, the landlord is entitled to take possession of the land.

Then it has been said, and truly said, that a notice to determine the tenancy must be clear and unambiguous; but that does not at all, in my opinion, mean that a notice otherwise sufficient is made insufficient by its being accompanied by something else; notice to quit must be clear and unambiguous, so as to shew the tenant what the landlord has bound himself to do—no longer to require of the tenant to pay rent or to be treated as a tenant; and if a notice does not definitely state that the landlord will no longer require the rent and treat the person to whom it is sent as tenant under the then existing tenancy after the day named, undoubtedly it is bad. For instance, take this example. Supposing the notice relied upon was this: "If you are dissatisfied you can give up possession." It cannot be said that that would be a good notice, because it is merely stating to the tenant what he may do if he is dissatisfied, and it binds the landlord to nothing. It does not say, "After the end of the year I shall not look to you for rent, I shall not look to you as my tenant." So as to one of the cases in Woodfall referred to, which was not a yearly tenancy, but the case of the breach of some covenants in a mining lease, where the landlord said, "Unless you employ a larger number of workmen I shall determine your tenancy;" that would not be a good notice, because that means, "If you still continue, as I think you are now doing, to break the covenants or conditions, I shall exercise my rights." That binds the landlord to nothing. He does not so determine the tenancy; and it is still open to him to say, "Notwithstanding the threat I then held out, I continue to look upon you as my tenant, and as such liable to me for the rent."

In the present case we have, in the first paragraph of the document of the 29th of October, a clear and certain notice to quit, a

notice indicating the intention and determination, and fixed purpose of the landlord that the then existing tenancy shall be at an end on the 1st of May. No doubt, that binding him, he could not afterwards say he had not put an end to that tenancy; but then, on the same sheet of paper, but in a separate and distinct paragraph, the landlord gives a further notice, not as in any way modifying or affecting that first notice, but, in my opinion, as offering new and distinct terms to the person who was tenant. He says to him, "The tenancy under which you have held hitherto is at an end from the 1st of May, but if you like to enter into a new tenancy with me, I am quite ready to do so." It would be quite impossible for the plaintiff after that to turn round and say, "I still continue to treat you as holding under the existing tenancy." If that fresh offer had been on a separate piece of paper, I hardly think it could be contended that it would then vitiate the notice to quit. If it is on the same piece of paper, but in an entirely separate paragraph, not in any way qualifying the notice to quit, though it does qualify, possibly, the effect and consequence of the notice to quit, because it enables him to enter into a fresh agreement, then, in my opinion, that offer does not vitiate it, or in any way allow the tenant to say that the first paragraph does not put an end to the tenancy, any more than it allows the landlord to say, "Notwithstanding the first paragraph of the notice, I still hold you as my tenant under the tenancy from year to year existing on the 29th of October, 1877, when I sent the notice." That being so, I hold that this notice was good, and it is not necessary here to say, as a general proposition or rule, what would be the effect of an agreement to pay an increased rent on a tenancy of a yearly tenant. But in this case I do say if the defendant had accepted the offer, if it be an offer, in the latter paragraph of the notice that then it would have been a new tenancy, the previous tenancy having been determined by the notice contained in the first paragraph of it. So that in this case if it is necessary to give an opinion on the point, I do hold that there would have been a new tenancy and not a continuance of the old tenancy, a larger rent being paid.

I ought to say a word or two upon the decision of Lord Mansfield

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and the text-books which have been so pressed upon us. No doubt anything Lord Mansfield says is entitled to the greatest weight, but I doubt whether if this case had been before him he would have expressed an opinion in any way inconsistent with that which Bramwell, L.J., and I have come to. Certainly it is not a binding decision upon us, and no decision or case is found in the books which lays down that a notice to quit, clear and unambiguous in itself, is made ineffectual because it is accompanied, although in the same piece of paper, yet in a distinct and separate paragraph, with an offer for a new tenancy. I do not think that Lord Mansfield there meant to lay down the notice to quit was bad. If it had been in a certain form: "You must give up possession or agree to pay a larger rent," then if the tenant remained in possession the action of ejectment might have failed, because there was evidence to go to the jury that he had accepted that offer and was entitled to possession, and the landlord was not in a position to treat him as a trespasser, even though the old tenancy had terminated.

Now as regards the text-books, I cannot in this case be influenced by the consideration that this matter occurred in the management of property. If the decision had laid down a rule which had affected the titles of estates, or if one could see that contracts which had been acted upon would be vitiated by any decision of ours, that would be a different matter; but the simple question is this, whether or no a form of notice of the determination of the tenancy from year to year is or is not good in such a case as this. I think too much importance has been attached to the way in which that case of Lord Mansfield is dealt with in the text-books as affecting titles to property. If we think that the text-books do not lay down a correct rule it is our duty to lay down a correct rule, and to decide this case according to the rights of the parties and according to law.

BRAMWELL, L.J. I should wish to add one remark. Let us suppose that the tenant had given a notice to quit sufficient in its terms, and had said, "But I am willing to continue in possession and will, if you will let me, at the diminished rent of so much."

Could there have been any doubt that that would have been a good notice on the part of the tenant?

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Appeals allowed. (1)

Solicitors for plaintiff: *Walker, Son, & Field, for Peacock, Cooper, & Gregory, Liverpool.*

Solicitor for defendant: *Fildes, Liverpool.*

[IN THE COURT OF APPEAL.]

March 26.

DAVIS *v.* GODBEHERE.

Practice—New Trial—Action remitted to County Court—Rules of Court, Order XXXIX., rule 1—19 *&* 20 *Vict. c.* 108, *s.* 26.

In an action commenced in a Divisional Court, and remitted for trial to a county court under 19 & 20 Vict. c. 108, s. 26, and tried by a judge without a jury, an application for a new trial must be made to a Divisional Court, and not to the Court of Appeal.

London v. *Roffey* (3 Q. B. D. 6) approved.

AN action commenced in the Exchequer Division of the High Court of Justice had been remitted under 19 & 20 Vict. c. 108, s. 26, to a county court to be tried. The cause was tried by the judge without a jury, who decided in favour of the plaintiff. After the trial the registrar of the county court certified the result to the Master of the Exchequer Division, and judgment in accordance with the certificate was signed.

Graham, moved on behalf of the defendant for a new trial, on the ground that the finding of the judge was wrong. He contended that the application was rightly made to the Court of Appeal under Order XXXIX., rule 1, for although the action was remitted to the county court to be tried, yet the judgment would be signed and the costs of the action taxed in the High Court. The action, therefore, remained in the High Court, and under Order XXXIX., rule 1, where in an action in the Divisional

(1) Judgment was entered in *Ahearn* v. *Bellman* for the plaintiff with 150*l.* mesne profits; in *Sedgwick* v. *Ahearn* for defendant; with order for costs, and costs in the Court below.

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Courts the trial had been by a judge without a jury, the application for a new trial must be to the Court of Appeal. He contended that *London* v. *Roffey* (1) ought to be overruled.

PER CURIAM. (2) The word "judge" in Order XXXIX., rule 1, means a judge of one of the Divisional Courts, and when we look at the context it is clear that it does not apply to a judge of the county courts. The order, therefore, has no application to trials before a county court judge without a jury; the motion ought to have been made to the Exchequer Division.

Motion refused.

Solicitor for defendant: *Percy R. T. Toynbee, agent for Toynbee, Larken, & Co., Lincoln.*

July 1.

[IN THE COURT OF APPEAL.]

THE HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE COMPANY (LIMITED) *v.* GRANT.

Company—Allotment of Shares—Letter of Allotment posted, but not received—Post Office, Agent of Parties contracting by Letter.

The defendant applied for shares in the plaintiffs' company. The company allotted the shares to the defendant, and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him:—

Held, by Baggallay and Thesiger, L.JJ., Bramwell, L.J., dissenting, that the defendant was a shareholder.

British and American Telegraph Co. v. *Colson* (L. R. 6 Ex. 108) overruled.

ACTION to recover 94*l.* 15*s.* being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in pursuance of an application from the defendant for such shares dated the 30th of September, 1874.

At the trial before Lopes, J., during the Middlesex Sittings, 1878, the following facts were proved. In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for

(1) 3 Q. B. D. 6. (2) Brett and Cotton, L.JJ.

shares in the plaintiffs' company, which stated that the defendant had paid to the bankers of the company 5*l.*, being a deposit of 1*s.* per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19*s.* per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on the 20th of October, 1874, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence 16, Herbert Street, Swansea, Glamorganshire; his name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the 5*l.* mentioned in his application, but the plaintiffs' company being indebted to the defendant in the sum of 5*l.* for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends, amounting altogether to the sum of 5*s.*, was also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury. 1. Was the letter of allotment of the 20th of October in fact posted? 2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative.

The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of *Dunlop* v. *Higgins*. (1)

The defendant appealed.

May 22. *Finlay* and *Dillwyn*, for the defendant, contended that the defendant was not a shareholder, for it was necessary that the allotment of shares should not only be made but also communicated to the defendant; that a letter posted but not received

(1) 1 H. L. C. 381.

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was not a communication to the defendant of the allotment, and that there was therefore no contract between the parties.

Wilberforce, and *G. Arbuthnot* (*W. G. Harrison, Q.C.*, with them), for the plaintiffs, contended that the contract was complete by acceptance when the letter was posted, and that the plaintiffs were not answerable for casualties at the post office preventing the arrival of the letter.

In addition to the authorities mentioned in the judgment, the following cases were cited during the argument: *Reidpath's Case* (1); *Townsend's Case* (2); *Wall's Case* (3); *Gunn's Case* (4); *Dunmore* v. *Alexander* (5); *Pellatt's Case* (6); *Ex parte Cote* (7); *Taylor* v. *Jones* (8); Pollock on the Law of Contracts, p. 13.

Cur. adv. vult.

July 1. The following judgments were delivered:—

THESIGER, L.J. In this case the defendant made an application for shares in the plaintiffs' company under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this Court.

The leading case upon the subject is *Dunlop* v. *Higgins*. (9) It is true that Lord Cottenham might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did

(1) Law Rep. 11 Eq. 86.
(2) Law Rep. 13 Eq. 148.
(3) Law Rep. 15 Eq. 18.
(4) Law Rep. 3 Ch. 40.
(5) 9 Shaw & Dunlop, 190.
(6) Law Rep. 2 Ch. 527.
(7) Law Rep. 9 Ch. 27.
(8) 1 C. P. D. 87.
(9) 1 H. L. C. 381.

rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so the Court is as much bound to apply that principle, constituting as it did a ratio decidendi, as it is to follow the exact decision itself. The exception was that the Lord Justice General directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonour posted by the holder of a bill of exchange in proper time, in which case he said (1), "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of *Dunlop* v. *Higgins* (2) is that taken by James, L.J., in *Harris' Case* (3), there (4) he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment," he adds, the Lord Chancellor "arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete and neither party can afterwards escape from it." Mellish, J., also took the same view, he says (5) "in *Dunlop* v. *Higgins* (2) the question was directly raised whether the law was truly expounded in the case of *Adams* v. *Lindsell.* (6) The House of Lords approved of the ruling of that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of

(1) 1 H. L. C. at p. 399.
(2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587.
(4) At p. 592.
(5) At p. 595.
(6) 1 B. & A. 681.

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a bill of exchange notice of dishonour, given by putting a letter into the post at the right time, had been held quite sufficient whether that letter was delivered or not; and he referred to *Stocken* v. *Collin* (1) on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of *Adams* v. *Lindsell* (2), and quoted the observation of Lord Ellenborough, C.J. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving *Harris' Case* (3) for the moment, I turn to *Duncan* v. *Topham* (4), in which Cresswell, J., told the jury that if the letter accepting the contract was put into the post office and lost by the negligence of the post office authorities, the contract would nevertheless be complete; and both he and Wilde, C.J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in *Dunlop* v. *Higgins*. (5) That opinion therefore appears to me to constitute an authority directly binding upon us. But if *Dunlop* v. *Higgins* (5) were out of the way, *Harris' Case* (3) would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retractation of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of *Adams* v. *Lindsell* (2), which is recognized authority upon this

(1) 7 M. & W. 515.
(2) 1 B. & A. 681.
(3) Law Rep. 7 Ch. 587.
(4) 8 C. B. 225.
(5) 1 H. L. C. 381.

branch of the law. But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How then are these elements of law to be harmonised in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case* (1), when in the course of his judgment he said: "*Dunlop* v. *Higgins* (2) decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post office is the common agent of both parties." Alderson, B., also in *Stocken* v. *Collin* (3), a case of notice of dishonour, and the case referred to by Lord Cottenham, says: "If the doctrine that the post office is only the agent for the delivery of the notice were correct no one could safely avail himself of that mode of transmission." But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in the *British and American Telegraph Co.* v. *Colson* (4), which was a case directly on all fours with the present, and in which Kelly, C.B., (5) is reported to have said, "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance and not from the subsequent notification of it. As in the case now before the Court, if the letter

(1) Law Rep. 4 Eq. at p. 12.
(2) 1 H. L. C. 381.
(3) 7 M. & W. at p. 516.
(4) Law Rep. 6 Ex. 108.
(5) At p. 115.

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of allotment had been delivered to the defendant in the due course of the post he would have become a shareholder from the date of the letter. And to this effect is *Potter* v. *Sanders*. (1) And hence perhaps the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or to put the question in the form in which it is put by Mellish, L.J., in *Harris' Case* (2) how there can be any relation back in a case of this kind as there may be in bankruptcy. If, as the Lord Justice said, the contract after the letter has arrived in time is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. The principle indeed laid down in *Harris' Case* (2) as well as in *Dunlop* v. *Higgins* (3), can really not be reconciled with the decision in the *British and American Telegraph Co.* v. *Colson*. (4) James, L.J., in the passage I have already quoted (5) affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers, with approval, to *Hebb's Case*. (6) There a distinction was taken by the Master of the Rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it, but he at the same time assumed that if, instead of sending it through an authorized agent they had sent it through the post office, the applicant would have been bound although the letter had never been delivered. Mellish, L.J., really goes as far, and states forcibly the reasons in favour of this view. The mere suggestion thrown out (at the close of his judgment, at p. 597), when stopping short of actually overruling the decision in the *British and American Telegraph Co.* v. *Colson* (4), that although

(1) 6 Hare, 1.
(2) Law Rep. 586, at p. 596.
(3) 1 H. L. C. 381.
(4) Law Rep. 6 Ex. 108.
(5) *Harris' Case*, Law Rep. 7 Ch. 592.
(6) Law Rep. 4 Eq. 9.

a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract as he says (1), is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in *Brogden* v. *Directors of Metropolitan Ry. Co.* (2), "put it out of his control and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound." How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the

(1) At p. 596. (2) 2 App. Cas. 666, 691.

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person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the Supreme Court of the United States in *Tayloe* v. *Merchants Fire Insurance Co.* (1), more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

BAGGALLAY, L.J. I am of opinion that this appeal should be dismissed.

It has been established by a series of authorities, including *Dunlop* v. *Higgins*, in the House of Lords (2), and *Harris' Case* (3), in the Court of Appeal in Chancery, that if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery.

The question involved in the present appeal is, whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. Lopes, J., was of opinion that the principle

(1) 9 Howard S. Ct. Rep. 390. (2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587.

was applicable to such a case, and gave judgment in favour of the plaintiffs, and from such judgment the present appeal is brought.

In support of his appeal the defendant relies upon the decisions of the Court of Exchequer in the case of the *British and American Telegraph Co.* v. *Colson* (1), to which, for conciseness, I will refer as *Colson's Case*. (1) I propose to consider *Dunlop* v. *Higgins* (2) and *Colson's Case* (1) and *Harris' Case* (3) somewhat in detail, for the purpose of ascertaining whether the decision of the Court of Exchequer in *Colson's Case* (1) is consistent with the decisions of the House of Lords and of the Lords Justices in the other two cases, and with the principles upon which such decisions were based.

The circumstances of *Dunlop* v. *Higgins* (2) were as follows: After a preliminary correspondence Messrs. Dunlop & Co., who were merchants at Glasgow, addressed a letter on the 28th of January, 1845, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2000 tons of iron pigs at 65*s.* per ton net. This letter reached Higgins & Co. at 8 A.M. on the 30th of January, and on the same day they replied by letter duly addressed to Dunlop & Co. in the following terms: "We will take the 2000 tons pigs you offer us."

It appeared by the evidence that the first post for Glasgow, after the receipt by Higgins & Co. of the letter of Dunlop & Co. left Liverpool at 3 P.M. on the 30th, and that the post next following left at 1 A.M. of the 31st, and also that a letter despatched by the former post would in due course arrive at Glasgow at 2 P.M. on the 31st, and by the latter in time to be delivered at 8 A.M on the 1st of February. The letter so sent by Higgins & Co. was posted after the bags were made up for the 3 P.M. post, and was despatched by the 1 A.M. post on the 31st. In due course it should have been delivered in Glasgow at 8 A.M. on the 1st of February, but it was not in fact delivered until 2 P.M. on that day, the frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared, also, that Higgins & Co., by mistake, dated their letter as of the 31st of January instead of the 30th of

(1) Law Rep. 7 Ex. 108. (2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587.

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January. On the 1st of February, after the receipt of the letter of Higgins & Co. accepting the offer, Dunlop & Co. wrote to Higgins & Co., "We have your letter of yesterday's date, but are sorry that we cannot now enter the 2000 tons, our offer not being accepted in time." The iron was not delivered, and Higgins & Co. brought their action for breach of contract. The defence of Dunlop & Co. was that their letter of the 28th should have been answered by the first post, viz., by that which left Liverpool at 3 P.M. on the 30th, but that at any rate they were not bound to wait for a third post delivered at Glasgow at 2 P.M. on the 1st of February.

On the trial before the Lord Justice General, he admitted evidence to shew that the letter of acceptance, though dated the 31st, was in fact written and posted on the 30th of January, and he directed the jury that if Higgins & Co. posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the post office establishment.

It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal, first to the Court of Session and thence to the House of Lords. The jury found for the plaintiffs; that is to say, they found as a fact that the letter of Higgins & Co. was posted in due time according to the usage of the parties in their business transactions, and having so found they, under the direction of the judge, gave their verdict for the plaintiffs. Exceptions were therefore taken by the defendants, and, amongst other grounds of exception, they objected to the admission of evidence as to the posting of the letter on the 30th of January, and to the direction of the Lord Justice General, to which I have just referred. The exceptions were overruled by the judges of the First Division, and from their decision the defendants appealed to the House of Lords; the appeal was dismissed, and the ruling and direction of the Lord Justice General were upheld.

Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is observed that the direction of the judge went further, for he ruled that if their letter was duly posted they were

not responsible for any casualties in the post office establishment. During the argument Lord Cottenham said, "The question is whether putting in the post is a virtual acceptance, though by the accident of the post it does not arrive;" and, in moving the judgment of the House, he observed, "if a man does all that he can do, that is all that is called for; if there is a usage of trade to accept such an offer and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do; how can he be responsible for that over which he has no control?" There is nothing in the language of Lord Cottenham to suggest any distinction between a case in which there is delay in the delivery of the letter and one in which the letter is not delivered at all. But Lord Cottenham went on to illustrate his meaning, and did so in the following terms: "It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor, and acceptance is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time it has been held quite sufficient; he has put the letter into the post, and whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." Having regard to the passages in Lord Cottenham's judgment, it appears to me impossible to doubt that the proposition which he intended to affirm, and which was in fact his ratio decidendi, was this, that when the letter accepting the offer was duly posted, the contract was complete, although it might be delayed in its delivery or might never reach the hands of the party making the offer.

I desire however to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop* v. *Higgins* (1) which has been sometimes adopted, and as I think without sufficient reason, viz. that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision in *Dunlop* v. *Higgins*. (1) On the contrary, I think that the principle

(1) 1 H. L. C. 381.

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established by that case is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized. In *Dunlop* v. *Higgins* (1) the previous correspondence between the two firms was, in my opinion, quite sufficient, not only to authorize the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated, and it was in consequence of the jury finding it as a fact that Higgins & Co. posted their acceptance of the offer to Dunlop & Co. in due time, according to the usage of their business transactions, that they found a verdict for the plaintiffs under the direction of the judge. The principle involved in *Dunlop* v. *Higgins* (1) was recognised by Cresswell, J. upon the trial of the action in *Duncan* v. *Topham* (2); upon that occasion he directed the jury that, if the letter accepting the contract was put into the post office and lost through the negligence of the post office authorities, the contract would nevertheless be complete; and upon an application in the same case, to make absolute a rule which had been obtained for a new trial, though the new trial was ordered upon other grounds, Wilde, C.J., and Maule, J., expressed views to the same effect as the direction of Cresswell, J.; in that case the letter never reached the hands of the person to whom it was addressed.

I proceed to consider the circumstances of *Colson's Case* (3), they were as follows. On the 13th of February, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of 2*l.* per share on whatever number should be allotted to him; on the 15th of the same month fifty shares were allotted to him, and a letter informing him of such allotment was posted to his address, as given in his letter of application for shares, viz., 31, Charlotte Street, Fitzroy Square.

Now a letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the

(1) 1 H. L. C. 381. (2) 8 C. B. 225.
(3) Law Rep. 7 Ex. 108.

usage in such matters, be considered as authorizing the acceptance of the offer by a letter through the post, as was expressed by Lopes, J., in the case now under consideration; such would be the ordinary mode of transmission of an allotment letter. The defendant however swore, and there was no reason to doubt the truth of his statement, that he never received the letter of allotment; that another person of the same name lived opposite to him in the same street: about that time the numbers in the street were changed, his own being altered from 31 to 87; and that several letters then sent to him had never reached him. On the 28th of February the plaintiffs, on being informed that the letter of allotment had not reached the defendant, sent him a duplicate, which he refused to accept; the action was then brought by the company to recover the 2*l.* per share. The jury found that the letter of allotment was posted to the defendant on the 14th of February but that he never received it, and that the second notice was not sent in a reasonable time. The learned judge, Bramwell, B., thereupon directed the verdict to be entered for the plaintiffs, but gave the defendant leave to move to have it entered for himself on the authority of *Finucane's Case* (1), which had recently been decided by Lord Romilly. A rule nisi was accordingly obtained, and cause was shewn on the 17th of November, 1870, the Court being composed of the Lord Chief Baron and Bramwell and Pigott, BB. Judgment was reserved, and on the 31st of January, 1871, the rule was made absolute to enter the verdict for the defendant.

The Lord Chief Baron, in the course of his judgment, expressed himself as follows: "It appears to me that if one proposes to another by a letter through the post to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter and the letter put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him, or otherwise brought to his knowledge, except in certain cases where the non-receipt of the acceptance has been occasioned by his own act or default." Now, unless the proposition so put by the Lord Chief Baron is to be read with some qualifications, it can hardly be considered as consistent with the decision in

(1) 17 W. R. 813.

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Dunlop v. *Higgins* (1), as such decision has ordinarily been understood. The view, however, taken by him of that decision does not appear to be in accordance with that generally taken; for after alluding to the circumstances of *Dunlop* v. *Higgins* (1) he proceeded to express his entire concurrence with the decision of the Court of Session and in the affirmance of it by the House of Lords, upon the ground that, in his opinion, the acceptance of the offer reached Dunlop & Co. in time, and that the House of Lords had acted upon the same view of the circumstances of the case; the distinction which he recognised between that case and the one then under consideration consisted in this, that whereas the letter of acceptance in *Dunlop* v. *Higgins* (1) was received by the party making the offer in due time, that in *Colson's Case* (2) never reached its destination. Pigott, B., did not give a separate judgment, but it was stated that he concurred in that of the Lord Chief Baron. Bramwell, B., also commented upon the circumstances of *Dunlop* v. *Higgins* (1), and referred to several passages in the judgment of Lord Cottenham, including those which I have quoted, and he then expressed himself as follows: "It seems to me that the correct way to deal with those expressions is to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs have contended for, but that when the post may be used between the parties it must be subject to those delays which are unavoidable." It would appear, then, that all the judges in the Court of Exchequer treated the case of *Dunlop* v. *Higgins* (1) as one decided upon its special circumstances, and as not enunciating any general principle beyond what was necessary for dealing with such circumstances. I am unable to concur in this view. It may be that there were special circumstances in the case of *Dunlop* v. *Higgins* (1) sufficient to have justified the decision of the House, irrespective of the application of the principle involved in the direction of the Lord Justice General; but the decision was not expressed to be based, and apparently was not intended to be based, upon any such ground, but upon an approval and of the direction of that learned judge.

After a careful consideration of the judgments of the Lord Chief Baron and of Mr. Baron Bramwell, I can come to no other

(1) 1 H. L. C. 381. (2) Law Rep. 7 Ex. 108.

conclusion than that the decision in *Colson's Case* (1) is inconsistent with that of the House of Lords in *Dunlop* v. *Higgins*. (2) If I am right in this conclusion it is not for me to choose between the two; I am bound by the authority of the decision of the House of Lords.

But I pass on to consider the circumstances of *Harris' Case* (3), which came before the Lords Justices in 1872. On the 5th of March, 1866, Lewis Harris, of Dublin, applied to the directors of the Imperial Land Company of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that or any less number of shares that might be allotted to him. The directors allotted to him 100 shares, and early on the morning of the 16th of March posted a letter to him at his address, as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter giving him notice of the allotment, written to the directors withdrawing his application and declining to accept any shares. Upon an order being made to wind up the company, Mr. Harris was placed upon the list of contributories in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, such summons was dismissed by Malins, V.C. From such dismissal Mr. Harris appealed, but the decision of the Vice-Chancellor was upheld. In giving judgment James, L.J., said that it appeared to him that the contract was completed the moment the notice of allotment was committed to the post, and a similar view was expressed by Mellish, L.J., who, after referring to the decision of the Court of Exchequer in *Colson's Case* (1), and stating that he had great difficulty in reconciling it with that of the House of Lords in *Dunlop* v. *Higgins* (2), observed, with reference to the last mentioned case, that the real question then before the House of Lords was, whether the ruling of the Lord Justice General was correct, and that the House of Lords held that it was.

It is doubtless true, as was observed by both the Lords Justices, that the decision in *Harris' Case* (3) was not necessarily inconsistent with that of the Court of Exchequer in *Colson's Case* (1),

(1) Law Rep. 6 Ex. 108. (2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 587.

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but it is, I think, clear that, although the Lords Justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognised the propriety of the distinction drawn by the Court of Exchequer between *Dunlop* v. *Higgins* (1) and *Colson's Case.* (2) I do not think it necessary to refer to *Finucane's Case* (3) and other cases decided by Lord Romilly, in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributory, further than to observe that in *Finucane's Case* (3), *Dunlop* v. *Higgins* (1), and *Duncan* v. *Topham* (4) were not cited, and that in the others the circumstances were such that the Master of the Rolls deemed himself justified in not following the decision in *Dunlop* v. *Higgins.* (1) Indeed, in one of those cases, *Hebb's Case* (5), he distinctly recognised the authority of the decision in *Dunlop* v. *Higgins* (1), which he considered to have been decided upon the ground that the post office was the common agent of both parties. For the reasons which I have assigned, I am of opinion that the principle established by the decision of the House of Lords in *Dunlop* v. *Higgins* (1) is applicable to the case now under consideration, and that the decision of Lopes, J., should be affirmed. I desire, however, to add that I have felt myself bound by authority. My own convictions are entirely in accordance with the principles which I consider to have been established by authority; and in saying this, I bear in mind as well the very forcible remarks made by the Lord Chief Baron and my present colleague upon the subject of the mischievous consequences that might ensue from an adoption of these principles in certain suggested cases, as the equally forcible remarks made by Mellish, L.J., as to the like consequences which would ensue in other cases if those principles were departed from.

BRAMWELL, L.J. The question in this case is not whether the post office was a proper medium of communication from the

(1) 1 H. L. C. 381.
(2) Law Rep. 6 Ex. 108.
(3) 17 W. R. 813.
(4) 8 C. B. 225.
(5) Law Rep. 4 Eq. 9.

plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him, gives the right to communicate in an ordinary manner and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case:

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer, per Brian, C.J., and Lord Blackburn: *Brogden* v. *Metropolitan Ry. Co.* (1)

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal, i.e., is by letter or message, as a rule, it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice.

(1) 2 App. Cas. at p. 692.

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Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post, e.g., notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter which, however, does not reach me, that he has communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man has paid his tailor by cheque or banknote, and posts a letter containing a cheque or banknote to his tailor, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques and banknotes to his banker by post, and posts a letter containing cheques and banknotes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognised this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if Brian, C.J., had had to adjudicate on the case, he would deliver the same judgment as that reported. That because a man, who may send a communication by post or

otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would be sent on receipt of a post office order. Is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to shew that such anticipation would not prevent the

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letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said, "unless I hear from you by return of post the offer is withdrawn," that the letter accepting it must reach him to bind him. There is indeed a case recently reported in the *Times*, before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till the 15th. Of course there may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on the 30th of June will suffice, though it does not reach till the 31st of July; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn" makes the receipt of the letter a condition, it is to say an express condition goes for nought. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as, if the words are "unless I hear from you by return of post, &c.," it is necessary the letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words. Lord Blackburn says that Mellish, L.J., accurately stated that where it is expressly or impliedly stated in the offer, "you may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on—as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letter had reached. As to the authorities, I shall not re-examine those in

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existence before the *British and American Telegraph Co.* v. *Colson.* (1) But I wish to say a word as to *Dunlop* v. *Higgins* (2); the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that *Dunlop* v. *Higgins* (2) decided nothing contrary to the defendant in this case. Mellish, L.J., in *Harris' Case* (3), says, "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of the *British and American Telegraph Co.* v. *Colson* (1) with *Dunlop* v. *Higgins.* (2) I do not share that difficulty. I think they are perfectly reconcilable, and that I have shewn so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out in *Harris' Case* (3) might happen if the law were otherwise when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in *Dunlop* v. *Higgins* (2) was whether the ruling of the Lord Justice Clerk was correct, and they held it was. Now Mr. Finlay shewed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in the *British and American Telegraph Co.* v. *Colson.* (1) Since the last case there have been two before Vice-Chanceller Malins, in the earlier of which he thought it "reasonable," and followed it. In the other, because the Lord Justices had in *Harris' Case* (3) thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds there is no default on his part. Why should he be the only person to suffer? Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by

(1) Law Rep. 6 Ex. 108. (2) 1 H. L. C. 381.
(3) Law Rep. 7 Ch. 596.

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Lopes, J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditioned on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post office depend on the contents of the letter? But if the post office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post office then? But how does an offerer make the post office his agent, because he gives the offeree an option of using that or any other means of communication.

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post office. The difficulty has arisen from a mistake as to what was decided in *Dunlop* v. *Higgins* (1), and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "your answer by post is only to bind if it

(1) 1 H. L. C. 381.

reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C.J., had had to decide this, a public post being instituted in his time, he would have said the law is the same, now there is a post, as it was before, viz., a communication to affect a man must be a communication, i.e., must reach him.

Judgment affirmed.

Solicitor for plaintiff: *Worthington Evans.*
Solicitor for defendant: *J. Davies.*

THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY, APPELLANTS; THE VESTRY OF THE PARISH OF ST. GILES, CAMBERWELL, RESPONDENTS.

June 30.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Paving New Street—Land bounding or abutting on New Street—Railway in Cutting—Bridge carrying New Street over Railway—New Street.*

A line of railway was situate in a deep cutting at a place where a road passed over the line. The road was carried over on a bridge from one boundary of the line to the other, but supported on stone piers erected on the slope of the cutting. On an information under s. 77 of the Metropolis Management Amendment Act, 1862, against the railway company for not contributing to the paving of the road:—

Held, that the line and the slopes of the cutting did not bound or abut upon the road within the meaning of the Act.

The line of houses adjoining the road terminated at the east end of the bridge, while after crossing the bridge there was but one cottage, and the roadway ceased to be a public thoroughfare, being closed by a private gate. A small portion of the slope of the cutting abutted on the road, between the west end of the bridge and the private gate:—

Held, that the railway company were not liable to contribute to the paving of the road, as it ceased at the eastern extremity of the bridge to be a "new street" within the meaning of the Act.

CASE stated by a magistrate of a metropolitan police court on an information preferred by the respondents under s. 77 of the Metropolis Management Amendment Act, 1862, against the appellants, for neglecting to pay a sum of money as a contribution to the paving of a new street called Chadwick Road in the respondents' parish.

1. Prior to the 30th of December, 1865, Chadwick Road ran

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across the land now occupied by the line of the appellants, and the road was at that time a private road. On the 30th of December, 1865, the appellants, under the powers conferred upon them by the London, Brighton, and South Coast Railway (Additional Powers) Act, 1864 (27 & 28 Vict. c. cccxiv.), purchased from the owners thereof so much of the road as was required by the appellants for the construction of their line, and in place of the old road built a bridge carrying the road over their line and over the place where the road had formerly been, and raised the level of the remainder of the road so as to pass over the bridge.

2. There is a gate placed across the road on the west side thereof after the road has crossed the bridge. On it is a notice board having the words "Private—No thoroughfare," written thereon, and the road onwards from that point is still a private road. As far as that point it is a public highway.

3. On the 3rd of November, 1877, the respondents served upon the appellants a preliminary notice stating, amongst other things, that the respondents deemed it necessary that part of Chadwick Road, being a new street as defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), should be well and sufficiently paved, and that the respondents were about to pave the same in pursuance of the 105th section of the first-mentioned Act, and that the contribution of the appellants towards the estimated expenses of such paving in respect of the railway abutting on the north and south sides, and also in respect of land on the south side, of which the Appellants were stated to be the owners, was 201*l.* 18*s.* 9*d.*

4. The appellants having objected to pay, the respondents served upon them three several notices requiring them to pay as their contribution towards the expenses of paving part of the road under the provisions of the said Acts the sum of 98*l.* 11*s.* 3*d.*, as owners of the London, Brighton, and South Coast Railway, for a frontage of 190 ft. 5 in. on the north side thereof, the sum of 88*l.* 12*s.* 7*d.*, as the owners of the London, Brighton, and South Coast Railway for a frontage of 173 ft. 9 in. on the south side thereof, and the sum of 14*l.* 14*s.* 11*d.* as the owners of land for a frontage of 24 ft. 9 in. also on the south side thereof.

5. The road carried over the line of the appellants crosses it at an angle of 45 degrees, running east and west on a bridge, which is supported on stone piers erected by the railway company upon the slope of the cutting on either side of the line.

6. The first mentioned measurement of 190 ft. 5 in. is the total length on the north side thereof of so much of the road as passes over the land and railway, and cutting and land on each side thereof, of the appellant company. The second mentioned measurement of 173 ft. 9 in., and the third mentioned measurement of 24 ft. 9 in., together make the total length on the south side thereof of so much of the road as passes over the land and railway of the appellant company.

7. No portion of the land of the appellants, in respect of which it is sought to charge them as aforesaid, is at present used for any other purpose than for their railway, and the appellants make no use of Chadwick Road.

8. Throughout the length of the road, as it passes over the appellants' railway, it is carried upon the bridge.

9. It was contended on the part of the appellants:—

(1.) That the road was not a new street within the meaning of the Acts.

(2.) That the appellants were not the owners of land bounding or abutting upon the road within the meaning of the Acts, and that none of their land was land bounding or abutting upon the road within the meaning of the Acts; and

(3.) That under the provisions of the Railway Clauses Act, 1845, the appellants were themselves bound to maintain the road throughout the length in respect of which it was sought to charge them, and that, consequently, the respondents had no authority to direct such portion of the road to be paved at the expense of the appellants.

The magistrate was of opinion that the road was a new street within the meaning of the Acts, and that the appellants were the owners of land bounding or abutting upon the road within the meaning of the Acts, and ordered the appellants to pay to the respondents the sum of 201*l.* 18s. 9*d.*

The question for the opinion of the Court was whether the appellants were liable to pay that sum to the respondents.

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1879. June 24. *Macrae*, for the appellants.

Edward Clarke (*R. V. Williams*, with him), for the respondents.

The arguments and the cases cited sufficiently appear from the considered judgment of the Court.

Cur. adv. vult.

June 30. The judgment of the Court (Kelly, C.B., and Hawkins, J.) was delivered by

HAWKINS, J. The question in this case is whether the appellants are liable to contribute towards the expenses of paving a part of Chadwick Road, in the respondents' parish, which the respondents determined to pave as a new street, under the power conferred upon them by s. 105 of the Metropolis Management Act, 1855. The appellants were sought to be made so liable as owners of land "bounding or abutting" on such street by virtue of the 77th section of the Metropolis Management Amendment Act, 1862. This liability was resisted upon three grounds:—

1st. That the appellants were not the owners of land "bounding or abutting" on the Chadwick Road.

2nd. That if they were so, that part of the Chadwick Road upon which they so bounded or abutted was not a new street within the meaning of the Act referred to.

And, thirdly, that inasmuch as the appellants were themselves bound under the Railway Clauses Act, 1845, to repair and maintain that part of the Chadwick Road upon which their lands were said to abut, the respondents had no authority to direct that portion of the road to be paved under the 105th section of the Act of 1855.

Chadwick Road was in the year 1865 a private road. In that year the appellants constructed one of their lines of railway in a deep cutting across it at an angle of forty-five degrees, and, in order to enable them to do so, purchased of the then owner so much of the road as was required for that purpose. In compliance with the provisions of the Railway Clauses Act, 1845, they carried the Chadwick Road over their cutting and railway by means of a bridge running east and west; which bridge is supported on stone piers erected by the respondents upon the slopes of the cutting.

After the road has crossed the bridge, and on the western

side of it, a gate is placed across the road on which is affixed a notice board with the word "Private" written thereon. Up to the gate, but no further, the road has now become a public road. There is a continuous row of houses along the southern side of Chadwick Road up to the eastern end of the bridge—and opposite this row of houses on the northern side are houses, a brewery and office—but at the western end of the bridge there is no building save one cottage, which is on the north side of the road, opposite to which, on the south side of the road and abutting on to it to the extent of 24 ft. 9 in., is a small piece of land belonging to the appellants, and occupied, as we were informed, as a cabbage-garden.

The open space occupied by the cutting on the northern side extends to the length of 190 ft. 5 in., and on the southern side to the length of 173 ft. 9 in.

The respondents contend that the bridge and road up to the gate are parts of a new street, which they are empowered to pave under the Metropolis Management Act, 1855, s. 105, and that the railway and cutting over which the bridge is constructed are lands of the appellants bounding or abutting upon the bridge within the meaning of s. 77 of the Metropolis Management Amendment Act, 1862. With regard to the small piece of cabbage garden, the only question is, whether the road upon which it abuts is part of a new street which the respondents are empowered to pave, for it cannot be disputed that it is land of the appellants abutting on the road.

We think it cannot be contended, after the cases of the *London and North Western Ry. Co.* v. *St. Pancras* (1) and *Higgins* v. *Harding* (2), that the banks of the cutting and the metalled surface upon which the railway is laid are not "lands" of the company within the meaning of s. 77 of the Act of 1862. We proceed, therefore, at once to consider whether, under the circumstances of the case, they can be deemed to "bound or abut upon" this Chadwick Road. For the purpose of determining this question we think some assistance may be derived from a reference to the terms of the 105th section of the Act of 1855, which imposes the obligation to contribute towards the paving of new streets.

(1) 17 L. T. (N.S.) 654. (2) Law Rep. 8 Q. B. 7.

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By that section it is thus enacted, inter alia: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board, &c., be desirous of having the same paved, or if such vestry or board deem it necessary, &c., then and in either of such cases such vestry or board shall well and sufficiently pave the same, &c., and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement." It is obvious from the language of the section that the legislature by it intended only to impose the liability of contributing towards expenses of paving any street upon the owners of houses ranged along the street itself, and opening into or contiguous to it.

This enactment, however, it will be observed, applied only to the owners of "houses" forming the street, and not to the owners of bare land, however much such land might be benefited by paving the street upon which it abutted. The 77th section of the Metropolis Management Amendment Act, 1862, was enacted to remedy this apparent injustice. By that section it is provided that "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same as well as the owners of houses therein," intending, it is clear, to place the owners of land upon the same footing as owners of houses, in other words, to make the owners of such lands liable as would have been liable under the 105th section of the 1855 Act had their lands been occupied by houses. It seems to us clear that neither the railway running under the bridge, nor the sloping sides of the cutting, can be in any sense deemed to bound or abut upon this Chadwick Road within the fair and reasonable construction of the 77th section of the 1862 Act. Could it possibly be said, if houses were erected on the spot now occupied by the railway, or on the sloping banks, that they formed part of a street with which they had no communication, and which was actually carried over them? Could the lands crossed by the high viaducts and railway bridges which are to be found in many parts of the country be said to bound or abut upon the roadway of the viaducts or bridges themselves? Or could the rivers traversed by bridges

high above them be said to bound or abut upon the roadway thereof?

In the course of the argument the case of the *London and North Western Ry. Co.* v. *St. Pancras* (1) was cited in support of the contention of the respondents. That case, however, only decided that the railway must be considered to abut upon the street, notwithstanding the fact that it was separated from it by a dead wall, which was also the company's property. The point now under discussion was not raised or suggested. That case is therefore no authority for the respondents.

This disposes of so much of the contribution as is claimed from the appellants in respect of the lands alleged to bound or abut upon the bridge itself. There remains, however, the small piece of land used as a cabbage garden, which unquestionably abuts upon Chadwick Road at the western end of the bridge. As to this the only question is, whether that part of the road can be deemed to be part of a new street. We are of opinion that it cannot. In *Pound* v. *Plumstead Board of Works* (2) Blackburn, J., says speaking of s. 105 of the Act of 1855, "I think that it is plain the legislature are here using the word 'street' in its ordinary, popular, and natural sense, and mean a place with continuous houses on each side." In *Galloway* v. *Mayor of London* (3) Lord Chelmsford said: "The word 'street' does not mean the mere roadway, but a thoroughfare with houses on both sides."

It is impossible in language to pronounce a definition of what constitutes a new street which shall be applicable to all cases. Each case must depend upon its own particular circumstances. But having regard to the facts, that the line of houses terminates at the eastern end of the bridge; that one solitary cottage alone is to be found at the western end, and that immediately after crossing the bridge from the eastward the thoroughfare ceases, and the road is closed by a private gate, we think the road ceases to be a street at the eastern extremity of the bridge, and, consequently, that the land used as cabbage garden does not abut upon a new street, and the company therefore are not liable to contribute to the paving of Chadwick Road in respect of it.

(1) 17 L. T. (N.S.) 654. (2) Law Rep. 7 Q. B. 183, at p. 194.
(3) Law Rep. 1 H. L. 34, at p. 55.

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This objection of course applies equally to the other lands of the company, viz., the railway and banks of the cutting, in addition to the objection that they do not abut upon the bridge.

Our judgment being for the appellants, upon the grounds we have discussed, it does not become necessary for us to consider whether the liability of the company to repair the bridge under the Railway Clauses Act, 1845, would afford them in law an answer to a claim for contribution to the paving of the Chadwick Road. We abstain from expressing any opinion upon that question.

It follows from what we have said that our judgment is for the appellants.

Judgment for the appellants with costs. (1)

Solicitors for appellants: *Norton, Rose, Norton, & Brewer.*
Solicitors for respondents: *G. W. Marsden & Son.*

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Nov. 20.

[IN THE COURT OF APPEAL.]

BEYNON & CO. *v.* GODDEN & SON.
H. R. EVANS, THIRD PARTY.

Practice—Costs of Third Party—Power of Court to alter Direction previously given as to Costs.

The Court has no power to annul a direction in a judgment previously delivered, that a third party shall pay the costs of the interlocutory proceedings taken to bring him before the Court, although by the judgment in the action it is ordered that he be dismissed from the action with costs to be paid by the defendants.

APPLICATION, by way of original motion, to vary the judgment delivered in this Court on the 18th of May, 1878. (2)

The defendants had claimed that H. R. Evans should be made a third party to the action, and had taken out a summons before a master to effect that object; the master having refused to make an order, a judge at chambers granted the application. Upon appeal, the Exchequer Division overruled the decision of the judge, and upon appeal to this Court the decision of the Exchequer Division was overruled with costs. H. R. Evans was thus

(1) Leave to appeal was refused. (2) 3 Ex. D. 263.

made a third party to the action. It was tried before Huddleston, B., without a jury; he decided in favour of the defendants, but ordered them to pay the costs of Evans. The defendants appealed to this Court, but the Lords Justices held that Evans was not liable, and he was dismissed from the action. (1) Upon taxation of the costs, the master declined to allow H. R. Evans the costs of the interlocutory proceedings, whereby he was made a third party, as the master felt himself bound by the order that Evans should pay the costs thereof.

A. T. Lawrence, for Evans. A great hardship will be inflicted upon Evans if he is not allowed the costs of the interlocutory proceedings; for although it is established by the judgment of this Court, affirming the decision of Huddleston, B., that he ought not to have been made a party, he will be compelled to pay the costs of resisting the steps improperly taken to bring him before the Court. He ought to have all the costs, which he has incurred through being made a party to the action. It is submitted that the view taken by the master upon taxation was wrong, and that the judgment of Huddleston, B., affirmed as it was by this Court, gave to Evans the costs of the interlocutory proceedings; if, however, this contention cannot be sustained, the judgment of this Court delivered upon the 18th of May, ought to be varied so as to annul the direction given when Evans was made a third party, and to allow him the costs of the interlocutory proceedings; this may be done under the Rules of the Supreme Court, Order LVIII., rule 5, which enacts that "the Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just."

Pollard, for the defendants, was not called upon to argue.

BRAMWELL, L.J. I do not think that we can alter the specific direction of this Court as to the interlocutory proceedings. When application is made for leave to add a third party, the Court can only consider whether there is a plausible ground for granting it. In the present case a plausible ground existed for joining Evans as a third party, and he was wrong in resisting the steps taken by

(1) See 3 Ex. D. 266, 267.

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the defendants. I do not think that we can alter the judgment of the Court delivered upon the 18th of May as to the main question in the cause. The application before us is to vary the judgment, and not to draw it up properly.

BRETT, L.J. Whatever order Huddleston, B., made as to the costs stands unimpeached by the judgment of this Court delivered upon the 18th of May, and if it is valid as to the costs of the interlocutory proceedings effect can be given to it. It seems to me that we have no power to alter the order, which we have already given as to the costs of the interlocutory proceedings; and I think that that order was right upon principle. Suppose that an application for leave to defend is made under the Summary Procedure of Bills of Exchange, 1855, and that leave to defend is granted, and upon appeal is allowed with costs, but that at the trial the plaintiff succeeds in obtaining judgment: can the defendant be then deprived of the costs granted to him by the interlocutory order? In my opinion he cannot.

COTTON, L.J. Under the former practice of the Court of Chancery upon an interlocutory proceeding the costs were not disposed of but were reserved, and the party who was successful upon the decree obtained them. I do not, however, dissent from the view of the other members of this Court.

Application dismissed.

Solicitors for defendants: *Cowdell, Grundy, & Browne.*
Solicitors for H. R. Evans: *Stocken & Jupp.*

[IN THE COURT OF APPEAL.]

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Nov. 20.

GALATTI *v.* WAKEFIELD AND ANOTHER.

Practice—Costs—Reference and Award—Reference by Consent—Costs of Award in discretion of Arbitrator—County Courts Act 1867 (30 & 31 *Vict. c.* 142), *s.* 5.

When an action is referred by consent to arbitration upon the terms that the costs of the cause shall abide the event, and the costs of the award shall be in the discretion of the arbitrator, if the arbitrator decides in favour of the plaintiff he may lawfully direct the defendant to pay the costs of the reference and award, although the plaintiff may be deprived of the costs of the cause under the County Courts Act, 1867, s. 5.

Quære, whether *Moore* v. *Watson* (Law Rep. 2 C. P. 314) was correctly decided.

ACTION commenced in the Liverpool District Registry to recover commissions amounting to 80*l.* 6*s.* 1*d.* The defendants delivered a counter-claim for 42*l.* 3*s.* 7*d.* It was agreed between the parties that all matters in dispute should be referred to an arbitrator, and an order by consent was drawn up providing that "the costs of the said cause shall abide the event and determination of the said certificate or award, and that the costs of the said certificate or award shall be in the discretion of the said arbitrator, who shall award or certify by whom or to whom and in what manner the same shall be paid, and the same shall be taxed, allowed, or deducted by the district registrar, and shall be recovered, if necessary, in the same manner as if the same were costs in the cause." By his award the arbitrator directed the defendants to pay to the plaintiff the sum of 10*l.* 3*s.* 4*d.* in settlement of his claim of 80*l.* 6*s.* 1*d.*, and directed that as to the defendants' counter-claim they were entitled to nothing. He further directed the defendants to pay to the plaintiff the costs of and incidental to the reference and the costs of the award. No order was made by the arbitrator within the meaning of the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5. Cleasby, B., ordered that the district registrar should tax and allow the costs of the plaintiff of the reference and award, and that the defendants should pay the same to the plaintiff. The defendants having appealed to the Exchequer Division, that Court dismissed the appeal: the defendants then appealed to this Court.

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Henn Collins, for the defendants. As the plaintiff has recovered less than 20*l.* in an action of contract, and has not obtained a certificate under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5 (1), the defendants cannot be compelled to pay the costs of the reference and award, for these are a portion of the costs of the cause. In *Moore* v. *Watson* (2) it was held by the Court of Common Pleas that upon a compulsory reference in an action of contract the plaintiff cannot get the costs of the reference, if he does not recover more than 20*l.*; it is submitted that the principle of that case applies here. If the costs of the reference are part of the costs of the cause, the parties cannot contract themselves out of the operation of the County Courts Act, 1867, s. 5. The incidents of the tribunal are the same, whether it is created by the parties or by the compulsion of a superior power. The rule which ought to be followed is that upon a reference the plaintiff is deprived of costs, where he only recovers a sum which would have disentitled him to costs if the action had been tried: *Smith* v. *Edge* (3); *Cowell* v. *Amman Colliery Co.* (4) The plaintiff may rely upon *Forshaw* v. *De Wette* (5), but that case is inconsistent with the other authorities and ought to be overruled by this Court.

D. French, for the plaintiff, was not called upon to argue.

BRAMWELL, L.J. It is unnecessary to call upon the plaintiff's counsel to argue. It cannot be seriously disputed that the Court of Exchequer was right in the decision at which it arrived in *Forshaw* v. *De Wette*. (5) It is impossible not to hold that the parties to an action may contract themselves out of the statute.

(1) By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5: "If in any action commenced after the passing of this Act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court, or a judge at chambers shall, by rule or order, allow such costs." The County Courts Act, 1867, s. 5, is incorporated by Supreme Court of Judicature Act, 1873, s. 67.

(2) Law Rep. 2 C. P. 314.

(3) 2 H. & C. 659; 33 L. J. (Ex.) 9.

(4) 6 B. & S. 333; 34 L. J. (Q.B.) 161.

(5) Law Rep. 6 Ex. 200.

It has been argued that there is no difference between a compulsory reference and a reference by consent, and that notwithstanding the discretion of the arbitrator as to the costs of the award they follow the event of the cause. In order to establish this proposition, reliance has been placed upon *Moore* v. *Watson* (1): it seems to me that that case is quite distinguishable from that before us; but I desire to add that, as at present advised, I do not agree with the decision; I, however, reserve my judgment, until the proper moment has come for determining whether it ought to be overruled. The decision was put upon the most technical ground; it was considered by the Court of Common Pleas that in a compulsory reference the costs of the award were part of the costs of the cause, because they were taxed upon the judgment. I feel great difficulty in agreeing with that argument; suppose that a cause is referred upon the terms that the costs of the action are to follow the event, but that the costs of the award are to be in the discretion of the arbitrator, and suppose that the plaintiff succeeds in the action, but that the arbitrator gives the costs of the reference to the defendant; how is the defendant to get his costs? I believe that upon taxation, as a matter of practice only, one allocatur is given; but I cannot see why there should not be two. Therefore, without either overruling or affirming the decision of the Common Pleas in *Moore* v. *Watson* (1), I am of opinion that the plaintiff is entitled to the costs of the reference, on the ground that the parties agreed that they should be in the discretion of the arbitrator, which he has exercised in favour of the plaintiff.

BRETT, L.J. In this case the question in dispute relates to the costs, not of the action but of the reference. The parties have agreed that the costs of the reference shall be in the discretion of the arbitrator. No Act of Parliament has been cited, which forbids that agreement from being carried into effect. *Moore* v. *Watson* (1) was a case of compulsory reference; I will say nothing now upon the question whether it was correctly decided.

COTTON, L.J. By the County Court Act, 1867 (30 & 31 Vict. c. 142), s. 5, the plaintiff is not to recover any costs, unless he

(1) Law Rep. 2 C. P. 314.

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recovers more than 20*l.* in an action of contract; but this refers to the costs of the suit; here the parties have agreed that the costs of the reference shall be in the discretion of the arbitrator, and he has awarded them to the plaintiff. We were much pressed during the argument by the decision in *Moore* v. *Watson* (1); but that was a case as to compulsory reference, and it is unnecessary now to decide whether any distinction exists between a reference by consent and a compulsory reference.

Appeal dismissed.

Solicitor for plaintiff: *J. H. Lydall, for Stephens & Danger, Liverpool.*

Solicitors for defendants: *Shaw & Tremellen, for Powles, Liverpool.*

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May 19.

[IN THE COURT OF APPEAL.]

TOMLINE *v.* THE QUEEN.

Petition of Right—Petitions of Right Act, 1860 (23 & 24 *Vict. c.* 34), *s.* 7—*Practice—Procedure—Production of Documents—Rules of the Supreme Court, Order XXXI., rule* 12—*Application by Crown against Suppliant for Discovery.*

In a petition of right the Crown is entitled as against the suppliant to an order for the discovery of documents, by the combined effect of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7, and the Rules of the Supreme Court, Order XXXI., rule 12.

PETITION of right, dated the 19th of August, 1878, and claiming payment of certain tolls under an agreement between the suppliant and the Crown to pay him 1*s.* a ton on certain kinds of goods, landed on and carried over a jetty built upon the suppliant's land adjoining the sea-shore. The Attorney General having pleaded on behalf of the Queen, the suppliant joined issue.

A summons at chambers was taken out by the Crown against the suppliant for the discovery and production of documents. A master made an order for discovery; the suppliant appealed to Field, J., who referred the matter to the High Court. The Exchequer Division (Kelly, C.B., and Pollock, B.), were of

(1) Law Rep. 2 C. P. 314.

opinion, upon the authority of *Thomas* v. *Reg.* (1), that the Crown was not entitled to discovery, and rescinded the order of the master.

The Crown appealed.

C. Bowen, for the Crown. The question is, whether in a petition of right the Crown is entitled to a discovery of documents as against the suppliant. That depends upon the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7 (2), which incorporates the laws and statutes in force as to pleading, practice, and procedure in suits between subject and subject, "so far as the same may be applicable." The words of the enactment are sufficiently wide to include not only existing but also future statutes as to practice and procedure.

[*Herschell, Q.C.*, for the suppliant, stated that he should not dispute that the practice and procedure introduced by the Supreme Court of Judicature Acts, 1873, 1875, extended in some respects to petitions of right.]

Then the only question is, whether discovery of documents is "applicable" to petitions of right. It is submitted that the Crown is entitled to it as against the suppliant; the right to it is not counterbalanced by any consideration of public policy or privilege. It has been decided by the Court of Queen's Bench in *Thomas* v. *Reg.* (1), that discovery cannot be obtained from the Crown; and the judges in the Exchequer Division were of opinion that the principle of that decision extended to cases where discovery is sought from a suppliant. It may be argued for the

(1) Law Rep. 10 Q. B. 44.

(2) By the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7, "so far as the same may be applicable, and except so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error, in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case, in which he would not have been entitled to such remedy before the passing of this Act."

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suppliant that as discovery if it were allowed in petitions of right would be one-sided only, it does not fall within the language of 23 & 24 Vict. c. 34, s. 7, which comprehends only those cases of practice and procedure, where a reciprocal advantage is bestowed on both the Crown and the suppliant; this argument is not maintainable; the suppliant ought to give discovery, although for technical reasons the Crown is not compellable to do so: those technical reasons are that the Queen is not specially named in the statute, that she is not such a corporation as can answer by officers, and that she herself cannot be compelled to answer on oath. The document, which a suppliant seeks to discover, may be such as by reason of public policy ought not to be set out in the schedule to an affidavit of documents. The Petitions of Right Act, 1860, has not interfered with the prerogative of the Crown in matters of pleading and procedure: *Tobin* v. *Reg.* (1): that case shews that what is applicable to a suppliant, is not necessarily applicable to the Crown; and the principle of that decision applies to this application for discovery, which is made under Rules of the Supreme Court, Order XXXI., rule 12. (2) The suppliant is not a party within the meaning of that rule.

[BRAMWELL, L.J. The Petitions of Right Act, 1860, s. 7, incorporates the practice as to security for costs: this can apply only against the suppliant; the Crown cannot be called upon to give security for costs.]

The relief, which can be obtained against the Crown, is not so extensive as that which can be obtained against a subject. *Thomas* v. *Reg.* (3) merely decided that discovery could not be had against the Queen, it did not decide that the practice introduced by the Common Law Procedure Act, 1854, was unavailable against a suppliant. If only those parts of the Rules of the Supreme Court are to be deemed to have been incorporated, which confer a complete reciprocity between the Crown and the suppliant, only a very small portion of the practice and procedure

(1) 14 C. B. (N.S.) 505; 32 L. J. (C.P.) 216.

(2) By Rules of the Supreme Court, Order XXXI., rule 12, "any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action."

(3) Law Rep. 10 Q. B. 44.

introduced by the Supreme Court of Judicature Acts, 1873, 1875, will apply to petitions of right.

English Harrison (*Herschell, Q.C.*, with him), for the suppliant. It is submitted that only those portions of the Supreme Court of Judicature Acts, 1873, 1875, are incorporated with the Petitions of Right Act, 1860, which confer a benefit on both the Crown and the suppliant; it has been decided in *Thomas* v. *Reg* (1) that the latter cannot have discovery, and therefore the Crown is not entitled to it. (2)

C. Bowen, did not reply.

BRAMWELL, L.J. I am of opinion that this appeal must be allowed. If it were not that the Exchequer Division came to a different conclusion from that at which we have arrived, I should have thought this a very plain case. Sect. 7, of the Petitions of Right Act, 1860, provides that the existing and future practice of the courts of law and equity as to procuring evidence in suits between subject and subject shall extend to petitions of right, subject to the qualification, "so far as the same may be applicable." I have not the least doubt that the practice as to discovery is "applicable" to petitions of right, when it is the Crown which seeks discovery from the suppliant. The case before us may be disposed of on this short ground. It is unnecessary to consider whether *Thomas* v. *Reg* (1) was correctly decided; but I will assume that technical reasons exist which prevent a suppliant from obtaining discovery: do these technical reasons make the practice

(1) Law Rep. 10 Q. B. 44.

(2) During the argument the counsel for the suppliant stated that the only reason for resisting the application for discovery was that the suppliant could not obtain discovery from the Crown; but that if the Court were of opinion that the decision in *Thomas* v. *Reg.* (Law. Rep. 10 Q. B. 44), was wrong, and that discovery could be obtained against either party to a petition of right, and if they on this ground overruled the decision of the Exchequer Division, the suppliant would not oppose the judgment against him. The counsel for the suppliant cited Bacon's Abridg. Corporations (A.): Grant on Corporations, pp. 626, 627, for the purpose of shewing that the Queen is, by the common law, such a corporation as may answer by the oath of its officers, that is, the ministers. The Lords Justices, however, held that the only question before them was whether the suppliant could be compelled to give discovery, and they declined to express any opinion whether *Thomas* v. *Reg.* (Law Rep. 10 Q. B. 44), was rightly decided, and whether the Crown was liable to give discovery.

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as to "discovery" less applicable as against a suppliant? I think not: the practice is as much applicable as to him as to the plaintiff and the defendant in an ordinary action. I repeat that it is unnecessary to express any opinion as to *Thomas* v. *Reg.* (1); but I may remark that if technical difficulties do exist in the way of obtaining discovery from the Crown, possibly the legislature has intentionally left those difficulties in existence, in order that it may be in the discretion of the Crown whether it will afford the information sought for by a suppliant.

BAGGALLAY and THESIGER, L.JJ., concurred.

Appeal allowed.

Solicitor for suppliant: *Walter F. Stokes.*

Solicitor for Crown: *W. Tindal Perkins, for the Solicitor for the Treasury.*

May 19.

[IN THE COURT OF APPEAL.]

HUNTER *v.* YOUNG AND WIFE.

Executor—Residuary Legatee—Action by Creditor of Testator—Non-joinder of Executor as Defendant—Practice—Rules of the Supreme Court, Order XVI., Rule 17.

In an action against Y. and A., his wife, the claim alleged that W. owed the plaintiff 40*l.*, and that at his death he appointed by his will M. W. his residuary legatee; that M. W. died, having by her will appointed A., the female defendant, her residuary legatee; that the residuary estate of W. had been assigned by his surviving executor to the defendants. The plaintiff claimed payment of £40 from the defendants, but the surviving executor of W. was not made a party to the action:—

Held, upon demurrer, that the claim disclosed a good cause of action; for even if the practice of the Court of Chancery would have required the surviving executor of W. to be joined as a defendant, the proper course (since the passing of the Judicature Acts, 1873, 1875) for the defendants to take, if they wished to bring him before the Court, was to make him a party to the action under Rules of the Supreme Court, Order XVI., Rule 17.

Clegg v. *Rowland* (Law Rep. 3 Eq. 368) commented upon and approved of.

WRIT issued 15th of March, 1878.

CLAIM:—

1. The plaintiff is the widow of Samuel Hunter, who died on

(1) Law Rep. 10 Q. B. 44.

the 15th of September, 1867, having by his last will appointed the plaintiff his sole executrix. The said will was duly proved by the plaintiff in the district registry at Salisbury, on the 13th of June, 1868.

2. In the year 1869, Samuel Witley, a solicitor of Devizes, received on behalf of the estate of the said Samuel Hunter moneys amounting to 227*l.* 15*s.* 7*d.*

3. On the 27th of February, 1873, the said Samuel Witley died, having then in hand a balance of 40*l.* 14*s.* 1*d.* of the said moneys due to the plaintiff, and having by his will made his widow, Mary Charlotte Witley, his residuary legatee. The said will was duly proved by the executors in the district registry at Salisbury, on the 21st of March, 1873.

4. On the 4th of March, 1877, the said Mary Charlotte Witley died, having by her will made the defendant Annie Maria Young (the wife of the defendant Frederick Young) her residuary legatee. Letters of administration, with the will annexed, were duly granted to Annie Maria Young, on the 26th of April, 1877.

5. On the 21st of December, 1877, a portion of the residuary estate of Samuel Witley to the amount of 250*l.* was paid by his surviving executor to the defendants or one of them, and the remainder of such estate, which was of considerable value, was assigned by the said executor to the defendants or one of them by deed dated the 21st of December, 1877.

6. The plaintiff requires payment by the defendants, or either of them, of the sum of 40*l.* 14*s.* 1*d.*, due to her out of the estate of the said Samuel Witley.

The surviving executor of Samuel Witley was not made a party to the action.

Demurrer on the ground that the defendants were not the representatives of Samuel Witley.

Upon the argument of the demurrer in the Exchequer Division, Cleasby, B., gave judgment for the defendants, upon the ground that the action ought to have been brought against the surviving executor of Samuel Witley, who was liable to discharge the plaintiff's claim against the estate of his testator.

The plaintiff appealed.

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May 12. *A. Charles, Q.C.*, and *Thomas Latham*, for the plaintiff. It may be admitted for the plaintiff that before the Supreme Court of Judicature Acts, 1873, 1875, she could not have recovered from the defendants the amount due to her by action at law; but now, since every division of the High Court is bound to take notice of equitable rights, an action brought in the present shape is the proper mode of enforcing the plaintiff's claim against the estate of S. Witley. Although the debt owing to the plaintiff does not constitute a fund which can be ear-marked in the defendants' hands, yet she is entitled to payment by those who are in possession of Witley's assets: *March* v. *Russell* (1); a creditor of a testator can compel a legatee to refund: 2 Williams on Executors, part iii. book iii. ch. iv. s. x. p. 1457 (8th ed.) The right to follow the assets is preserved by 22 & 23 Vict. c. 35, s. 29 (2), and nothing is to be found in that statute which interferes with the plaintiff's right to sue. The creditor of a testator may obtain payment of his debt out of a legacy which has been sold to a purchaser without notice of the debt, if the latter has not actually received the amount of the legacy: *Noble* v. *Brett.* (3) The counsel for the defendants may contend that the claim is bad, because the surviving executor of Witley has not been made a defendant in the action; but under the former practice in equity

(1) 3 My. & Cr. 31, at p. 40, per Lord Cottenham, L.C.

(2) By s. 29 of 22 & 23 Vict. c. 35 (commonly called Lord St. Leonards' Act), "Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of the distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively."

(3) 24 Beav. 499; 27 L. J. (Ch.) 516.

legatees might in some cases be sued without making the executor a party to the suit; as, for instance, where the estate had been administered under the direction of the Court, and a creditor sued for a subsequently accruing debt: *Thomas* v. *Griffith.* (1) A fund, which had been transmitted from a British colony, might be distributed by the Court of Chancery pursuant to the directions contained in a will proved in the colony without making the executor a party to the proceedings: *Arthur* v. *Hughes.* (2) An executor who has distributed the estate after giving the notices directed by 22 & 23 Vict. c. 35, s. 29, cannot be afterwards held liable by any creditors of the testator: *Clegg* v. *Rowland.* (3)

[BAGGALLAY, L.J. Primâ facie the executor is liable, and unless he has been freed from liability a legatee cannot be sued alone. Can any case be found where a legatee has been sued without making the executor a defendant, besides those cases, where an estate has been administered by the direction and under a decree of the Court, or where notices have been given pursuant to 22 & 23 Vict. c. 35, s. 29?]

No; but the principle of *Clegg* v. *Rowland* (3) ought to be extended to all cases, where an executor has innocently parted with the assets. At all events the claim is not demurrable; the remedy for the defendants to take is to make the surviving executor of S. Witley a third party to the action under Rules of the Supreme Court, Order XVI., rule 17. If the executor is wrongfully made a defendant by the plaintiff, she may have to pay his costs.

Petheram, for the defendants. The action in its present shape is misconceived; the surviving executor of S. Witley is the person primarily liable, and he ought to have been joined as a defendant. Legatees are liable only to refund to executors, and not to creditors.

[THESIGER, L.J. To say the least, that argument seems inconsistent with the reasoning in *Clegg* v. *Rowland.* (3)]

The defendants may be liable to refund for the benefit of Witley's estate generally; but he may have left other creditors, and the plaintiff ought not to enjoy a priority over them. No

(1) 2 Giff. 504; on appeal 2 D. F. & J. 555; 30 L. J. (Ch.) 465.

(2) 4 Beav. 506.

(3) Law Rep. 3 Eq. 368.

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debt is due from the defendants to the plaintiff; if they are held liable in this action, it is difficult to say where the responsibility of legatees will stop.

[THESIGER, L.J. The plaintiff is not claiming payment of a debt due from the defendants; she is simply following the assets of S. Witley; when they are exhausted, the liability of the defendants will cease.]

A. Charles, Q.C., in reply. To the extent of the assets which they have received, the defendants represent S. Witley, and are bound to pay the debts owing by him. As to the argument that S. Witley may have left other creditors, it may be replied that this is an action brought by the plaintiff on her own behalf to recover payment of a debt due to her, and there is nothing in law to prevent a creditor, who uses greater expedition, from obtaining payment of his debt in priority to other claims.

Cur. adv. vult.

May 19. The following judgments were delivered:—

BRAMWELL, L.J. I was aware that under the practice of the Court of Chancery legatees might in some cases be compelled to refund the amounts bequeathed to them, after payment by the executor; nevertheless I was struck with the novelty, as it seemed to me, of the present claim. I do not wish to express a confident opinion, but the conclusion at which I have arrived is that this appeal must be allowed. The claim alleges that a sum of money was due from S. Witley to the plaintiff, and that the female defendant is the administratrix and residuary legatee of his residuary legatee, and that the residue of his estate has been assigned by his surviving executor to the defendants; therefore they are in the same position as if they had been his residuary legatees. The claim in effect avers that the debts due by S. Witley, and the legacies bequeathed by him, have been paid, and that his remaining assets have been handed over to the defendants; and the question is whether an action is maintainable by the plaintiff without joining S. Witley's surviving executor as defendant. I speak with reserve as to the former practice of the Court of Chancery; but after consulting Baggallay, L.J., and other eminent persons acquainted with equity, I find that it was considered

very doubtful whether a suit by a creditor could be maintained against the residuary legatees of his debtor without joining the executor as a defendant. It was established that residuary legatees who had received their legacies might be sued by an unpaid creditor of their testator and compelled to refund the amounts paid to them: upon this point I need only refer to Seton on Decrees, vol. ii. part 4, ch. 23, s. 30, pp. 976 and 977 (4th ed.), and the cases *Hall* v. *Palmer* (1) and *Fordham* v. *Wallis* (2), therein referred to. As the residuary legatees might be sued, it would seem to be unreasonable that in order to obtain payment of his debt a creditor of the testator should be compelled against his will to make the executor a party to the suit: suppose that the executor was dead, intestate and insolvent, would the creditor be bound to get some person appointed administrator de bonis non before he could sue the residuary legatee? I think not. Equity jurisprudence has grown up out of the practice of the Courts, and one might expect to find that in some cases a residuary legatee might be sued without joining the executor as a defendant. I own that I feel doubts in the present case; the executor, if joined, might allege that other debts of the testator had been discovered, and might claim to have the estate restored to him. I think, however, that as to this consideration, it is sufficient to repeat that the claim, which by the demurrer is admitted to be true, in effect avers that all the debts have been paid. I will now refer to 22 & 23 Vict. c. 35, s. 29: the proviso at the end of this enactment preserves the right of any creditor or claimant to follow the assets of a testator, but it enacts that the executor shall not be liable for the assets: it may be argued that, although the executor is not to be liable, he must nevertheless be made party to a suit against the legatees; I cannot assent to an argument of that kind; for if an executor is not liable to pay, he ought not to be sued; the legislature cannot have intended that the executor should be joined when no remedy can be had against him; the enactment must mean that the suit shall be maintainable against the legatees without joining the executor. I wish to refer in support of my view to *Clegg* v. *Rowland* (3), where Malins, V.C.,

(1) 3 Hare, 532. (2) 10 Hare, 217.
(3) Law Rep. 3 Eq. 368.

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held that executors who had distributed the assets of their testator after taking the steps pointed out by 22 & 23 Vict. c. 35, s. 29, would have the same protection as if they had administered the estate under a decree of the Court, and were not liable to make good sums improperly received by their testator in his lifetime. So far as it goes, this case is a strong authority in favour of the plaintiff. I should therefore have given judgment for the plaintiff, on the ground that in the Court of Chancery the plaintiff might have sued the defendants without joining the surviving executor of S. Witley; but even if before the Supreme Court of Judicature Acts, 1873, 1875, equity would have required the executor to be joined, I think that the rule of practice has been done away with, and that if the defendants wished to bring the surviving executor of Witley before the Court, they ought instead of demurring to have joined the surviving executor as a third party under the Rules of the Supreme Court, Order XVI., rule 17. It will probably turn out that the executor has no interest in this action, and it does seem to me much better to allow the parties, who are really concerned in the result, to fight out the question in dispute without bringing into Court an uninterested person. The demurrer must be overruled, and the appeal must be allowed. If the action had been brought to recover a large amount, it would have been well to take the opinion of the House of Lords whether our decision is correct.

BAGGALLAY, L.J. I have felt, and do still feel, great doubt as to what our decision in this case ought to be. Under the old practice in equity when a creditor took proceedings against the estate of his deceased debtor, it was essential to have before the Court the personal representative, and the legatee might be made a party to the suit in order to enable the creditor to follow the assets. Upon this general rule an exception had been engrafted, where a decree had been made for the administration of the estate and the assets had been dealt with and distributed under the direction of the Court. In a case of this kind the personal representative was not liable to be subsequently sued by a creditor whose debt had not been satisfied. Another exception has been added by Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 29, which

provides that when an executor has given notices similar to those used in administration suits, he shall be at liberty to distribute the testator's assets amongst the parties entitled thereto; the notices discharge the executor from liability, and he is in the same position as if the estate had been administered under the direction of the Court of Chancery. In order, however, to protect him it is essential that he should have no notice of any claim which, at the time of the distribution of the assets, is left unsatisfied. The claim in the present action does not allege that the notices required by 22 & 23 Vict. c. 35, s. 29, have been given, and that at the time of distributing the assets the surviving executor of Witley had no notice of the plaintiff's claim. (1) As the plaintiff does not allege that the directions of that statute have been complied with, I should have felt inclined to adopt the view of Cleasby, B., and to allow the demurrer. I do not, however, dissent from the judgment of the other members of this Court. Certainly, the view of my colleagues lays down a convenient rule of practice. If the notices directed by 22 & 23 Vict. c. 35, s. 29, had been given, and the executor had received no notice of the plaintiff's claim, the case would have fallen within the authority of *Clegg* v. *Rowland* (2), and the action would have been clearly maintainable. I repeat that I feel doubts; but upon the whole I concur in holding that the demurrer must be overruled.

THESIGER, L.J. The principle upon which the action is founded is, that where an executor has administered assets and paid over the residue of an estate, a creditor of the testator is entitled to follow the residue to the extent of his debt. The fund is the point to which the action is directed, and the person in whose hands the fund is would, as it appears to me, be naturally the

(1) It was understood by the reporter that notices were issued pursuant to 22 & 23 Vict. c. 35, s. 29, to the creditors of S. Witley after his death to send in their claims, and that the plaintiff thereupon gave notice to his executor of the debt due to her; and that her demand not being then paid, it was overlooked when the assets of Witley were assigned to the defendants. The plaintiff therefore could not with truth aver in the claim that the requirements of the statute had been complied with by Witley's executor.

(2) Law Rep. 3 Eq. 368.

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party against whom the action would be brought. The executor, if he has protected himself in the way pointed out by Lord St. Leonards' Act, is, according to the decision of Malins, V.C., in *Clegg* v. *Rowland* (1), quâ executor, not a proper party at all; but if, in such a case, he might be made a party, and even in cases where the executor has not protected himself under Lord St. Leonards' Act, I cannot think that the plaintiff's statement of claim is demurrable, because she has not made him a party. If there are rights arising out of the action to be adjusted between the executor and the residuary legatee, the latter may bring him into the action by the machinery provided by rule 17 of Order XVI. of the rules under the Judicature Acts.

It seems unreasonable that the plaintiff in cases like the present should be bound to make the executor a party, when the plaintiff's case is that she has no ground of claim against the executor, and might have to pay his costs if she did join him as a defendant.

Appeal allowed.

Solicitors for plaintiff: *Wood, Latham, & Bigg, for Day & Marshall, Devizes.*

Solicitors for defendants: *Courtenay & Croome, for Beale & Martin, Reading.*

(1) Law Rep. 3 Eq. 368.

[IN THE COURT OF APPEAL.]

1879
May 27.

DAVIES *v.* McVEAGH.

Ship—Charterparty—Arrival of Ship at Place of Loading—Demurrage.

By a charterparty it was agreed that the plaintiff should at L. load on the defendant's vessel, the *P.*, a cargo of coal, and that she should proceed therewith to D., "the vessel to be loaded and discharged in nineteen running days, or if longer detained, to pay 4*l.* per day demurrage." At the foot of the charterparty was a memorandum, "Vessel to load in B. M. Dock or W. Dock, high level." On the day following the execution of the charterparty, the *P.* was, as a matter of favour, admitted into the W. Dock, and was then ready to receive her cargo, but owing to the regulations of the dock authorities she did not begin to load until about a fortnight later. Upon her arrival at D. disputes arose between her captain and the plaintiff as to the form of the bill of lading, and in consequence thereof her cargo was not unloaded until twenty days had elapsed after the expiration of the nineteen running days, if calculated from the time of her admission into the W. Dock. In order to obtain delivery of the cargo, the plaintiff was obliged to pay 80*l.* claimed as demurrage in respect of the twenty days, which he now sued to recover back:—

Held, that the nineteen running days were to be calculated from the time when the *P.* was admitted into the W. Dock, that the plaintiff was liable for demurrage, and that the action would not lie.

ACTION to recover back the sum of 80*l.* paid by the plaintiff under protest, and also damages for delay in delivering a cargo of coal shipped on board the defendant's vessel, the *Pleiades*.

At the trial before Brett, L.J., at Liverpool Spring Assizes, 1878, the following facts were proved:—

The plaintiff was a coal merchant carrying on business in Runcorn, and the defendant was owner of the schooner *Pleiades*. The following charterparty was entered into between the plaintiff and the defendant:—

"Liverpool, 19th November, 1877.

"I hereby engage with Joseph Davies, Esq., to receive and load on board my vessel, the *Pleiades*, of Belfast, being tight, staunch, and strong, and every way fitted for the voyage, a full and complete cargo of coal, about 375 tons to 390 tons, and proceed to Dublin, Burgh Quay, or so near thereunto as she may safely get, and deliver the same, per bills of lading, on being paid freight at the rate of 6*s.* per ton of 20 cwt., and three guineas gratuity.

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The vessel to be loaded and discharged in nineteen running days, or if longer detained, to be paid 4*l.* per day demurrage, (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, during the said voyage, always excepted). Ship to have a lien on the cargo for all freight, dead freight, and demurrage.

"Penalty for non-performance of this agreement, estimated amount of freight.

(Signed) "Thomas McVeagh."

"I hereby engage to load said vessel on the above terms. Vessel to load in B. Moore or Wellington Dock, High Level.

(Signed) "Joseph Davies.

"Nov. 19, 1877."

Bramley Moore Dock and Wellington Dock were adjacent docks at Liverpool, and were approached through Wellington half-tide Basin. At the end of Wellington Dock was a high level railway and platform, with convenient tips for loading coal.

On the 19th of November the *Pleiades* finished unloading her inward cargo in the Wellington half-tide Basin, and was ready to ship coals for the plaintiff so soon as she could get a berth. On the 20th she was admitted into the Wellington Dock as a matter of favour, because, being empty, she was in danger outside; but in consequence of the regulations of the dock authorities, who had control over all vessels in the docks, she was unable to obtain a berth at the high level till the 5th of December. She then began to load, and finished loading on the 6th. The captain refused to sign any bill of lading, except one containing the words, "Sixteen days have been consumed in loading the sai vessel in Liverpool, leaving three running days for discharging at Dublin." This bill of lading the plaintiff refused to take. The *Pleiades* sailed from Liverpool, and arrived at Dublin on the 23rd of December. The captain would not deliver the cargo except on the production of a bill of lading in the form above mentioned, and the vessel remained unloaded for some time. Ultimately, in order to obtain delivery of the cargo, the plaintiff was obliged to accept a bill of lading in the form above mentioned,

and to pay under protest the sum of 80*l.*, being the demurrage claimed by the captain for twenty days' detention. The plaintiff now sued to recover this sum of 80*l.*, and also damages sustained by delay in delivering the cargo.

Upon these facts, which were not disputed, Brett, L.J., gave judgment for the defendant.

The plaintiff appealed.[1]

May 26, 27. *Gully, Q.C.* (*J. C. Mathew*, with him), for the plaintiff. The running days did not commence until the *Pleiades* had obtained a loading berth; and she did not obtain it before the 5th of December. The defendant's counsel may contend that the running days commenced upon the 20th of November, when the ship had discharged her inward cargo; this contention, however, is at variance with *Tapscott* v. *Balfour* (1), where upon facts similar to those now before this Court, it was held that the lay-days commenced from the time of the vessel entering the dock. It is true that in the present case the *Pleiades* was admitted into the Wellington Dock upon the 20th of November; but her admission was granted only as a matter of favour, in order that she might get to a place of shelter, and it does not appear that her captain could have claimed as matter of right to take her inside the dock until she began to load; therefore nothing in *Brown* v. *Johnson* (2), or *Tapscott* v. *Balfour* (1), is adverse to the plaintiff's contention. These cases are not impeached by the decision in *Ashcroft* v. *Crow Orchard Colliery Co.* (3), where the words of the charterparty were, "To be loaded with the usual despatch of the port."

C. Russell, Q.C., and *D. French*, for the defendant. In *Tapscott* v. *Balfour* (1), no fixed number of days was allowed for loading the plaintiff's vessel; in the present case, a period of nineteen running days was fixed as the time within which the *Pleiades* was to be loaded and discharged, and the principle must be applied similar to that which was laid down in *Thiis* v. *Byers* (4), namely, that "where a given number of days is allowed to the charterer for unloading, a contract is implied on his part, that, from the

(1) Law Rep. 8 C. P. 46.
(2) 10 M. & W. 331.
(3) Law Rep. 9 Q. B. 540.
(4) 1 Q. B. D. 244, at p. 249.

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time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay-days." The defendant, as shipowner, had done all that he was bound to do by the charterparty, when the *Pleiades* was ready to ship the cargo for the plaintiff and had entered the Wellington Dock. It is for the charterer to bear the loss occasioned by the regulations of the dock authorities: *Ashcroft* v. *Crow Orchard Colliery Co.* (1), which comments upon and explains *Kearon* v. *Pearson.* (2) Of the earlier cases, *Randall* v. *Lynch* (3), and *Brown* v. *Johnson* (4), so far as they go, are in favour of the contention for the defendant; perhaps *Kell* v. *Anderson* (5) may support the argument for the plaintiff; but it does not outweigh the authorities which have been cited upon the defendant's behalf.

Gully, Q.C., in reply.

BRAMWELL, L.J. This appeal must be dismissed. When a ship is to take on board cargo at a specified place of loading, the responsibility rests not with her owner but with the charterer, if the specified berth is not in a fit state to receive her upon her arrival at the appointed time. In the present case, the ship was at her place of loading, when she was admitted into the Wellington Dock. Definitions are always dangerous, and I am not anxious to state one, which hereafter may be questioned; but I think it may be laid down that a vessel has reached the place of loading, as distinguished from the spot of loading, when she has entered that port from which her voyage is to commence. I am not afraid of the consequences, even if this definition is pushed to a great extent: suppose that the defendant's vessel had been lying in the river Mersey, and that her captain had given notice to the plaintiff that he was ready to enter the dock, and ready to take on board the cargo: I do not think it would have been open to the plaintiff as charterer, to contend that the vessel was not at the place of loading, that she was not in a proper position, and that the nineteen days did not begin to run. If the

(1) Law Rep. 9 Q. B. 540.
(2) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(3) 2 Camp. 352.
(4) 10 M. & W. 331.
(5) 10 M. & W. 498.

defendant's vessel had got into the dock and had afterwards been turned out by the authorities, so far as concerns the defence in this action, she would have been in as good a position for loading as if she had remained inside the dock. It has been argued that if we determine in favour of the defendant, we shall be going counter to the reasoning in *Tapscott* v. *Balfour*. (1) I do not propose to discuss the authorities at length; but I may say that if *Tapscott* v. *Balfour* (1) is at variance with our decision, it is also opposed to *Ashcroft* v. *Crow Orchard Colliery Co.* (2)

BAGGALLAY, L.J. I am of the same opinion; it is very plain to me that this appeal must be dismissed. The running days began at the latest at the time when the *Pleiades* was cleared, and was lying in the Wellington Dock.

THESIGER, L.J. I am of the same opinion. By inserting the clause as to the nineteen running days a definite time is stated for loading and discharging the cargo. I do not think it of much consequence whether the time is definite or indefinite; nevertheless, the circumstance, that the time for loading and unloading was not strictly defined, seems to have had some weight with the Court of Common Pleas in leading them to the decision in *Tapscott* v. *Balfour* (3); but in *Ashcroft* v. *Crow Orchard Colliery Co.* (2), the language of the charter was indefinite, and yet it was held that the charterers were liable for delay in loading the vessel owing to the pressure of business in the docks. In the present case the *Pleiades* was ready to receive her cargo on the 19th or at least the 20th of November; but several days elapsed before the plaintiff was able to put it on board; for that delay he is in law responsible; and as against him, the running days commenced from the 20th of November.

BRAMWELL, L.J. I wish to add, that my view is justified by *Randall* v. *Lynch* (4), and *Brown* v. *Johnson*. (5) Allusion has been made to *Kell* v. *Anderson* (6); but that case is to be explained by the circumstance that at the time of the alleged

(1) Law Rep. 8 C. P. 46.
(2) Law Rep. 9 Q. B. 540.
(3) Law Rep. 8 C. P. 46, at p. 53.
(4) 2 Camp. 352.
(5) 10 M. & W. 331.
(6) 10 M. & W. 498.

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detention, the vessel had not in point of law completed her voyage.

Judgment affirmed.

Solicitor for plaintiff: *H. G. Field, for Etty, Liverpool.*

Solicitors for defendant: *Crowder, Vizard, & Anstie, for J. M. Quiggin, Liverpool.*

July 4.

WALE, APPELLANT; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 109, *and Schedule tit. Mortgage—Transfer or Assignment of Mortgage.*

By an indenture in 1877—after reciting that by a mortgage in 1872, W. the mortgagor had conveyed certain hereditaments to secure 350*l.* lent to him by the mortgagees with a proviso for redemption on payment of the 350*l.*—it was witnessed that in consideration of 350*l.* paid by S. to the mortgagees at W.'s request in satisfaction of all moneys owing upon the recited mortgage (the receipt of which 350*l.* the mortgagees acknowledged, and therefrom released S. and W.), and also in consideration of 120*l.* paid by S. to W. the mortgagees conveyed and released, and W. released and confirmed to S. in fee, the hereditaments discharged from the said proviso for redemption; with a proviso for redemption on payment by W. to S. of the two sums of 350*l.* and 120*l.*, making together the sum of 470*l.*, and a covenant by W. for payment thereof to S.:—

Held, that though there was no formal assignment of the old debt of 350*l.* and though that debt and the old equity of redemption were extinguished, the indenture of 1877 was as to the 350*l.* in substance a "transfer of a mortgage" within the meaning of the schedule to the Stamp Act, 1870, and was therefore liable to be stamped as a transfer, with a further ad valorem duty on the fresh advance of 120*l.*, and was not liable to be stamped as a "mortgage" for 470*l.*

CASE stated by the Commissioners of Inland Revenue, pursuant to the 19th section of the Stamp Act, 1870.

1. A full copy of the instrument in question was annexed, and was to be taken as part of the case.

2. The instrument being then stamped with the duty of 6*s.* was on the 28th of December, 1877, presented on behalf of Wale to the Commissioners of Inland Revenue under the provision of the 18th section of the Stamp Act, 1870, for their opinion as to the stamp duty with which it was chargeable.

3. The commissioners being of opinion that the instrument was chargeable under the provisions of the Stamp Act, 1870, as a mortgage for 470*l.* with the ad valorem duty of 12*s.* 6*d.* assessed

the duty thereon accordingly, and the instrument has been stamped, and the duty paid thereon in conformity with the assessment.

4. Wale being dissatisfied with the assessment, required the commissioners to state and sign a case to enable him to appeal against the same.

5. Wale contended that the instrument was, as to the sum of 350*l.* (part of the said sum of 470*l.*) a transfer, assignment, disposition or assignation of a mortgage within the meaning of the Act, and was, in respect of the sum of 350*l.*, chargeable with stamp duty at the rate of 6*d.* and no more for every 100*l.* and for any fractional part of 100*l.* of the said 350*l.*—that is to say—with the duty of 2*s.* and no more, and that the instrument was to the extent only of the sum of 120*l.*, the remainder of the said sum of 470*l.*, chargeable with duty as a mortgage or principal security for a sum exceeding 100*l.* and not exceeding 150*l.*—that is to say—with the duty of 3*s.* 9*d.* and no more, making together with the duty of 2*s.* the total duty of 5*s.* 9*d.* and no more. The mortgage for 350*l.*, which is recited in the instrument, has been produced to the commissioners and is stamped with the duty of 10*s.*

The question to be decided by the Court was: With what amount of stamp duty the instrument was chargeable.

The material parts of the indenture in question were as follows:—

It was made on the 15th of November, 1877, between Fox of the first part, S. Ingram, widow, of the second part, Wale (the appellant) of the third part, and C. Sutton of the fourth part, and after reciting—

That by an indenture dated the 15th of July, 1872, and made between the said Wale of the first part, the said S. Ingram of the second part, and the said Fox of the third part, in consideration of 350*l.* paid by S. Ingram to Wale, and also for a nominal consideration paid by Fox to Wale, Wale at the request of S. Ingram granted, released, and conveyed to Fox, his heirs and assigns, certain hereditaments to hold to the use of Fox, his heirs and assigns for ever, subject to certain annuities and the powers for the recovery thereof:

And that by the said indenture it was declared that if Wale,

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his heirs, executors, administrators, or assigns, should pay to S. Ingram, her executors, administrators, or assigns, the sum of 350*l.*, together with interest for the same after the rate at the time and in the manner therein mentioned, Fox, his heirs or assigns, would, upon the request of Wale, his heirs or assigns, reconvey the said hereditaments thereby granted to the use of Wale, his heirs or assigns, or to such other persons as he or they should appoint: and that by the said indenture there were powers of sale and other powers which had never been exercised: and that the said principal sum of 350*l.* still remained due to S. Ingram upon the above in part recited indenture of mortgage, but that all interest for the same had been paid, and that S. Ingram having required payment of the said sum of 350*l.*, Wale had applied to Sutton to lend him the sum of 470*l.*, to enable him to pay off the same, and to supply his other occasions which she had consented to do upon having the repayment thereof with interest secured in manner thereinafter expressed:

It was witnessed, That in consideration of the sum of 350*l.* paid by Sutton to S. Ingram at or before the execution of these presents, at the request of Wale, being in full satisfaction and discharge of all moneys owing upon the said above in part recited indenture of mortgage, the receipt of which 350*l.* S. Ingram acknowledged, and therefrom released and discharged Sutton, her heirs, &c., and also Wale, his heirs, &c.: And also in consideration of 120*l.* at the same time paid by Sutton to Wale, the payment and receipt of which several sums of 350*l.* and 120*l.*, making together 470*l.* Wale acknowledged, and therefrom released and discharged Sutton, her heirs, &c.:

Fox, at the request of S. Ingram and Wale, granted, released, and conveyed, and S. Ingram remised and released, and Wale granted, released, conveyed, and confirmed to Sutton and her heirs the said hereditaments, and all the estate, right, title, interest, claim, and demand whatsoever, both at law or in equity of Fox, S. Ingram, and Wale, respectively, to hold to the use of Sutton, her heirs and assigns for ever, freed and absolutely discharged from the said proviso for redemption thereof contained in the thereinbefore part recited indenture of mortgage, and all equity thereupon, and the trusts or powers for sale in the said

indenture contained, but subject and without prejudice to the said annuities, and to the powers for recovery thereof:

Provided always, and it was thereby declared that if Wale, his heirs, &c., should pay to Sutton, her executors, &c., the sum of 470*l.*, with interest at the rate of 5*l.* per cent., on the 15th of May next, then at any time thereafter, Sutton, her heirs and assigns, should at the request and costs of Wale, his heirs, &c., reconvey the said hereditaments to the use of Wale, his heirs and assigns, or as he or they should direct, free from all incumbrances created by Sutton, her heirs, &c. And Wale covenanted with Sutton that he, his heirs, &c., would pay to Sutton, her executors, &c., the said sum of 470*l.* with interest after the rate aforesaid, at the time and in manner thereinbefore appointed:

Provided always that if default should be made in payment of the said sum of 470*l.* and interest, or any part, Sutton, her executors, &c., might sell and convey the said hereditaments, and apply the moneys arising therefrom in payment first of the expenses, and next of the moneys owing upon the security, and pay the surplus, if any, to Wale, his heirs, &c.

The indenture in question also contained covenants by Wale for title, quiet enjoyment, and further assurance, and for insurance against fire; and covenants by Fox and S. Ingram against incumbrances by them respectively.

June 26, July 4. *A. Wills, Q.C.* (*S. Dickinson*, with him), for the appellant, contended that the instrument was a transfer or assignment within the meaning of the schedule to the Stamp Act, 1870, tit. Mortgage (1), and therefore liable to an ad valorem duty

(1) The Stamp Act, 1870 (33 & 34 Vict. c. 97), by s. 3 imposes "upon the several instruments specified in the schedule to this Act the several duties in the said schedule specified, and no other duties."

Sects. 105–115 are headed "As to Mortgages, &c."

Sect. 105: "The term 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be. . . . ."

Sect. 109: "No transfer of a duly stamped security, and no security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is to be charged with any

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of 2*s.* on the 370*l.* transferred, and to a further ad valorem duty of 3*s.* 9*d.* on the fresh loan of 120*l.* and to no more.

Sir H. S. Giffard, S.G., Q.C. (*Dicey*, with him), for the commissioners. The instrument in question is a fresh mortgage for 470*l.* True, 350*l.* part thereof is to pay off the old mortgagee, but still the mortgagor borrows it from the new mortgagee. There is no assignment of the old debt of 350*l.*, and it is extinguished. In Bythewood and Jarman's Conveyancing Precedents, vol. vi. p. 337, 3rd ed. by Sweet, 1840, a form is given of a transfer of mortgage of leaseholds, from which (mutatis mutandis) the present deed seems to have been drawn; and in note (*a*) it is said: "Though the precedent is classed with transfers of mortgages in conformity to popular phrase (that term being commonly applied to all transactions in which the money advanced by the new mortgagee is applied in liquidation of a subsisting mortgage debt), yet it is more properly speaking a new mortgage. The derivative term indeed which is vested in the new lender is drawn out of the old mortgagee's estate, but this

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duty by reason of containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security."

Schedule: "Mortgage, bond, debenture, covenant, warrant of attorney, to confess and enter up judgment and foreign security of any kind:

(1.) Being the only, or principal, or primary security for—

The payment or repayment of money not exceeding 25*l.* . . 8*d.*

. . . . . .

. . . . . .

Exceeding 100*l.* and not exceeding 150*l.* . . . . . 3*s.* 9*d.*

. . . . . .

Exceeding 300*l.*

For every 100*l.*, and also for any fractional part of 100*l.* of such amount . . . . 2*s.* 6*d.*

. . . . . .

(3.) Transfer, assignment, disposition or assignation of any mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:

For every 100*l.*, and also for any fractional part of 100*l.* of the amount transferred, assigned, or disponed . . . . . 6*d.*

And also where any further money is added to the money already secured:

The same duty as a principal security for such further money."

seems to make no substantial distinction. The material fact is that the estate is *subject to a new proviso for redemption* which in effect constitutes it a new mortgage. It will be proper, therefore, to stamp the deed as a mortgage, even if it be thought probable, as suggested in another place, that an instrument of this kind would be considered as a transfer of mortgage within the meaning of the Stamp Act, since a difference of opinion exists upon the point. (Vide, ante, vol. v. p. 537.) Where the parties are anxious to avoid the stamp, the mortgage should be transferred subject to the existing equity of redemption, and a covenant by the mortgagor added to pay the debt; of which an example will be given in the next precedent. By leaving the equity of redemption undisturbed, instead of limiting a new proviso for redemption as in the present case, the ground upon which the ad valorem stamp might be contended to attach is removed, for the instrument is in strict propriety a transfer of mortgage only . . ." The test is the new proviso for redemption, and in the present case there is a new proviso for redemption, and the old equity of redemption is gone. In Davidson's Precedents, vol. ii. p. 694 (2nd ed. 1858), after discussing such an instrument as the present, it is said, "A transfer after this fashion is in fact a new mortgage, and gives the transferee all the rights of an original mortgagee."

Wills, Q.C., in reply. The passage cited from Bythewood refers to a passage in vol. v. p. 537, where the author, writing in 1837, when 55 Geo. 3, c. 84, as amended and partly repealed by 3 Geo. 4, c. 17, s. 2, was the Stamp Act in force says, "It could not have been the intention of the legislature to subject persons availing themselves of the benefit of the exemption in the statute to this inconvenience; the object evidently was that mortgage money which has once paid the ad valorem duty should not be liable again; and therefore strong reasons exist for concluding that it would be held that wherever part of the money advanced by a mortgagee on an estate already in mortgage is applied in liquidation of the existing mortgage debt the deed is a 'transfer of mortgage' within the meaning of the Stamp Act. At the same time it ought to be observed that this opinion has some learned opponents who contend that the introduction into the instrument

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of a new proviso for redemption constitutes it for the purpose in question a new mortgage to which the ad valorem duty attaches." Then came 13 & 14 Vict. c. 97, s. 9, which was passed to remove the difficulties created by *Lant* v. *Peace* (1) and other cases, in which it was decided that a transfer of a mortgage required a further duty if it operated as a further security, e.g., if there was a covenant by the mortgagor with the transferee to pay the money. These cases and statutes are fully discussed in Sweet's Supplement to Bythewood and Jarman, tit. Purchase Deeds, p. 149, written in 1850; Hayes' Concise Conveyancer, p. 456, 2nd ed., by Coltman, 1864; and Davidson's Precedents, vol. ii. pt. 2, p. 825, note, 3rd ed. 1869, in all of which the writers support the appellant's contention. Then s. 109 of the Act of 1870 effects the object intended by 13 & 14 Vict. c. 97, s. 9. The result is, that an original mortgage is liable to ad valorem duty; a fresh advance is also liable to an ad valorem duty; and a transfer of an original mortgage is not liable to pay the original ad valorem duty again, but is liable to a transfer ad valorem duty. The present claim of the Crown is the first that has been made since 13 & 14 Vict. c. 97, and the point seems never to have been discovered till now.

Sir H. S. Giffard, S.G., Q.C., in reply. (2) No doubt s. 109 of the Act of 1870 was pointed at *Lant* v. *Peace* (1) and the other cases referred to; but it left a "transfer" still undefined. The test is whether the old debt is extinguished. It is so here, because the covenants to pay it are released.

KELLY, C.B. In my opinion the appellant is entitled to judgment. The ground on which the Crown claims the higher duty is that the instrument is not a "transfer" of a mortgage. I asked who possessed that mortgage the day before the instrument in question was executed, and who possessed it just after the execution? Mrs. Ingram and her trustee had it just before the execution, and immediately after the execution Sutton had it. How did Sutton become the possessor of that mortgage, unless in

(1) 8 Ad. & E. 248.

(2) This right of final reply was claimed on behalf of the Crown, and allowed by the Court.

substance Mrs. Ingram and her trustee transferred the mortgage to her? The particular mode and form in which the change or transfer was carried out, do not affect the question. In substance the effect of the whole transaction was a transfer of the mortgage from Mrs. Ingram and her trustee to Sutton. It may be said that this is an evasion of the rights of the Crown. I think if you can evade the rights of the Crown by keeping yourself out of the operation of a statute imposing a tax upon the public you are at perfect liberty to do so. The parties have done so here. It is true they went through the form of paying off the old debt to Mrs. Ingram; but at the same instant the mortgagor becomes a debtor to Sutton.

In substance, therefore, this is a transfer of a mortgage from Ingram to Sutton, and what led to this roundabout dealing between the parties was, I suppose, that they did not like to trust Wale with the money. If this was not a transfer, how is it that Ingram was a party to the instrument which conveys the premises to Sutton? We are considering what tax should be imposed upon the subject, and when we look at s. 109 of the Stamp Act, 1870, it is clear that the object of the legislature was not to multiply taxation, but, although the securities might be varied and additional security given, to look to the substance of the transaction. In substance this is a transfer of the mortgage from Ingram to Sutton, though it is through the medium or intervention of Wale. The tax has been paid on an instrument which it is not denied has vested in Sutton the mortgage which once was in Ingram, and which could not have passed to Sutton unless in some way or other by the execution of an instrument it had been tranferred to Sutton.

I think, therefore, it comes within the intent of the legislature as a transfer, and that the Crown is not entitled to our judgment.

POLLOCK, B. I also think that the appellant is entitled to judgment, though it has not been without some doubt that I have arrived at that conclusion. The question depends on what view is taken of the 3rd paragraph of the schedule of the Stamp Act,

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1870, title "Mortgage." The Solicitor-General argued that the result of the instrument in question is that the first equity of redemption is extinguished and then the original mortgagor conveys the estate to the new mortgagee. But with what meaning does the legislature use the word "transfer"? The words of the schedule are "transfer of any mortgage;" and then there is an ad valorem duty for every 100*l.*, and also for the fractional part of every 100*l.* on "the amount transferred, assigned, or disponed." In ordinary language, what is it that is "transferred or assigned?" It is substantially the debt and interest of the first mortgage. Reading the statute in that sense—and I think it should be read in that sense, especially if there is any doubt in the matter, as being most in favour of the subject—the contention of the appellant is correct.

But, said the Solicitor-General, by this schedule the duty payable is to depend upon "the amount transferred," and he said here there is no amount transferred, because the whole 470*l.* is borrowed on the security of a new mortgage of the whole estate, the mortgage being for the whole undivided sum of 470*l.* But let us look at the substance of the thing. It is true that the first mortgagee is paid off, and that there is not an actual transfer of the debt of 350*l.*, but practically so far as the mortgagor is concerned, and looking at the ordinary use of language by conveyancers, one would say the mortgagee held, not an entirely new mortgage, but a transfer of the old mortgage for 350*l.*

Judgment for the appellant.

Solicitor for appellant: *Williamson, Incorporated Law Society.*
Solicitor for commissioners: *Solicitor of Inland Revenue.*

[IN THE COURT OF APPEAL.]

1879
June 18.

RAY *v.* BARKER.

Practice—Procedure—Rules of the Supreme Court, Order XIV.—Goods received "upon Sale or Return"—Effect of staying Proceedings upon Debtor's Summons for same Debt.

The defendant received from the plaintiff jewelry "upon sale or return;" the defendant delivered it to a woman who, without his authority, pledged it, and he was unable to recover it. The plaintiff thereupon issued a debtor's summons against the defendant for the price of the jewelry; but proceedings upon it were stayed without calling upon the defendant to give security for the amount claimed. The plaintiff did not appeal from the decision upon the debtor's summons. Subsequently the present action was commenced with a specially indorsed writ, and a master directed under Rules of the Supreme Court, Order XIV., that the plaintiff should be at liberty to sign judgment, unless the defendant paid into court the amount claimed within four days:—

Held, that the order of the master could not be set aside; for although, as the plaintiff had not appealed against the decision upon the debtor's summons, it might have been better to refuse to entertain an application under Order XIV., yet the plaintiff was otherwise entitled to sign judgment unless the condition imposed should be complied with, the defendant not setting up a clear defence upon the merits.

Moss v. *Sweet* (16 Q. B. 493; 20 L. J. (Q.B.) 167) commented on.

APPEAL of the defendant from an order of Pollock, B., and Hawkins, J., reversing an order of Stephen, J.

The plaintiff's claim was for 62*l.* 17*s.*, being the price of certain jewelry alleged to have been sold to the defendant, and the writ having been specially indorsed the plaintiff took out a summons under the Rules of the Supreme Court, Order XIV., and the following facts appeared on the affidavits. The plaintiff had, upon the 23rd of February, 1878, sent to the defendant diamond earrings of the value of 40*l.* "upon sale or return." The defendant alleged that he had delivered the earrings to a woman, who stated that she thought she could find a purchaser, but who pledged them and then absconded; a warrant had been issued for her apprehension, but the defendant had been unable to get back the earrings; he did not state the name of the pawnbroker. The defendant did not suggest any defence as to 22*l.* 17*s.*, being the balance of the plaintiff's claim after deducting the above sum of 40*l.* After the

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plaintiff had become aware that the earrings had been misappropriated, he, upon the 1st of July, 1878, invoiced them to the defendant, and alleged that he was justified in so doing by a custom of the trade. It further appeared that upon the 3rd of December, 1878, before the commencement of this action, the plaintiff took out a bankruptcy summons against the defendant in respect of the amount claimed in this action; the defendant applied to dismiss the summons, and the registrar who heard the application stayed proceedings without calling upon the defendant to give security for the amount, and he directed an action to be tried. The plaintiff did not appeal from the order of the registrar, and took no steps to enforce his claim, and upon the 3rd of May the defendant obtained an appointment for the dismissal of the summons and gave notice thereof to the plaintiff, who, upon the 6th of May, issued the writ in the present action. A master made an order that the plaintiff should be at liberty to sign judgment, unless the defendant should pay into court the amount claimed within four days. Upon appeal to Stephen, J., the master's order was rescinded. Upon appeal to the Exchequer Division it was held that the master's order was right, and that the plaintiff should be at liberty to sign judgment if the money should not be paid into court. The defendant appealed to this court.

Anderson, for the defendant. The claim of the plaintiff is not for a debt or liquidated sum; he really seeks to recover damages for breach of the contract to return the earrings; the writ is not specially indorsed within the meaning of the Rules of the Supreme Court, Order XIV. (1) The liabilities of a person receiving

(1) By Rules of the Supreme Court, Order XIV., rule 1: "Where the defendant appears to a writ of summons specially indorsed under Order III., rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a judge, why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a judge that he has a good defence to the action on the the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empower-

goods "upon sale or return" was considered in *Ex parte Wingfield, In re Florence* (1); and it follows from that case that from the mere receipt of the goods he does not become the owner of them; he has merely an option to buy them, which must be exercised before he can be charged with the price of them. Moreover the plaintiff did not appeal against the decision upon the debtor's summons; it has therefore been decided by a Court of competent jurisdiction that the plaintiff has not such a primâ facie case as to entitle him to call upon the defendant to give security for the amount claimed, and the master ought not to have made an order in favour of the plaintiff.

Morton Smith, for the plaintiff. The order of the master was rescinded by Stephen, J., under the belief that *Runnacles* v. *Mesquita* (2) shewed that the plaintiff was not entitled to sign judgment; it is submitted that this view was erroneous. The plaintiff relies upon *Moss* v. *Sweet* (3) as establishing that when goods are received "upon sale or return," they must be deemed to have been sold unless they are returned within a reasonable time. In the present case the defendant has kept the earrings for a long time, and has not even yet returned them. It may be conceded for the plaintiff that if he had appealed from the decision of the registrar in bankruptcy, and had failed to obtain a reversal of it, he would not have been entitled to sign judgment under Order XIV.; but as he did not take this course, he is not concluded by the decision of the registrar, and is entitled to avail himself of the order made by the master in the exercise of his discretion.

Anderson, replied.

BRAMWELL, L.J. In my opinion this appeal must fail. Order XIV. no doubt contains useful provisions: it improves the procedure very much in actions for debts, where there is really no defence; for it saves the expense attending the formality of a

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ing the plaintiff to sign judgment accordingly."

Rule 6: "Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the Court or a judge may think fit."

(1) 10 Ch. D. 591.

(2) 1 Q. B. D. 416.

(3) 16 Q. B. 493; 20 L. J. (Q.B.) 167.

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trial at which perhaps the defendant will not appear. Nevertheless it is a remedy, which ought not to be used except where the plaintiff's case is clear: if there be any doubt as to the right to recover, he ought not to be allowed to avail himself of a process, so summary in its nature. By the first rule of Order XIV., an order may be made empowering the plaintiff to sign judgment in an action where the writ has been specially indorsed; but this rule is to be read subject to the sixth rule, which provides that leave to defend may be given either unconditionally or upon terms. Upon the facts before us I do not think that the defendant is entitled to defend unconditionally. I may remark, however, that as the registrar of the Court of Bankruptcy refused to put the defendant under the terms of finding security, the master ought in his discretion to have held his hand and to have declined to make an order: for the plaintiff might have appealed from the decision of the registrar, if he were dissatisfied with it. The question, however, now before us is whether upon the merits the master was justified in making an order empowering the plaintiff to sign judgment, unless the defendant should bring the money into court within four days: and in my opinion the order made by the master was correct. Although the defendant ought not to be permitted to defend unconditionally, yet he is entitled to some opportunity of disputing his liability; for I cannot say that this case in concluded by *Moss* v. *Sweet*. (1) In that case the defendant either might have returned the goods, or was prevented from returning them by his own act, that is, by selling them. In the present case the defendant is unable to return the earrings by the dishonest act of another person; and the Court of Queen's Bench did not decide that if the failure to return, within a reasonable time, goods received "on sale or return" arose from the wrongful act of another person, the person receiving them is to be deemed to have bought them; nevertheless although this point was not decided, I incline to think that the person receiving goods on those terms must under all circumstances either return them within a reasonable time or pay for them. The case set up by the defendant appears to be shadowy, but I cannot say that the action is absolutely undefended. The plaintiff ought not to be at liberty to sign judgment, if the

(1) 16 L. J. (Q.B.) 439; 20 L. J. (Q.B.) 167.

defendant brings the money into court. The master and the judges of the Exchequer Division have held that the defendant ought to have leave to defend only upon the performance of a condition: I cannot say that they have wrongly exercised their discretion, and I cannot overrule their decision. This appeal must be dismissed.

BRETT, L.J. In this case we have to consider what is the true construction of Order XIV. When the existence of the debt has been clearly established upon the affidavits, the plaintiff is entitled to an order empowering him to sign judgment. The defendant, however, is to have leave to defend, either if he has a good defence upon the merits, or if he discloses "such facts as may be deemed sufficient to entitle him to defend." If therefore the defendant shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, he ought not to be debarred of all power to defeat the demand made upon him: by the very words of the order the plaintiff is not to be allowed to sign judgment merely because the defendant's affidavit does not shew a complete defence. By the sixth rule a discretion is conferred, and leave to defend may be granted either unconditionally or upon such terms as may be thought just. In the present case the defendant's affidavit did not shew a clear defence. I am strongly of opinion that the principle of *Moss* v. *Sweet* (1) establishes that the defendant in the present case cannot resist the plaintiff's claim: but the decision does necessarily include the facts before us. The facts alleged by the defendant are so far plausible as to entitle him to defend conditionally: this was the view taken by the Exchequer Division; and the condition, which they imposed, was that the defendant should pay the money into court. I think that the order was rightly made. The plaintiff also took proceedings in bankruptcy which did not result in his favour. He then applied to a master for leave to sign judgment: as a general rule, where proceedings taken in bankruptcy to recover a debt, prove abortive, a summons for leave to sign judgment under Order XIV. ought not to be entertained. The master, however, did entertain the application,

(1) 16 Q. B. 493; 20 L. J. (Q.B.) 167.

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and the view which he took was approved of in the Exchequer Division. Upon taking into consideration all the circumstances of the case, I cannot say that the conclusion at which the master and the judges of the Exchequer Division arrived was wrong: and therefore in my judgment the order appealed from must stand.

COTTON, L.J. I think that the power conferred by Order XIV. ought to be used carefully, and that we ought to consider whether in the present case an order ought to have been made. If the defendant's affidavit sets up a good defence, the Court has no discretion and cannot order the money claimed to be paid into court. But an alternative is allowed in which leave to defend may be given, namely, where the defendant discloses "such facts as may be deemed sufficient to entitle him to defend:" and it is this state of facts to which the discretionary power given by the sixth rule is directed. The affidavit may not make it clear that there is a defence, but the defendant may be able at the trial to establish a bonâ fide defence. I am not satisfied that in the present case a valid defence exists; but the defendant may plausibly argue that he has a good defence. *Moss* v. *Sweet* (1) does not decide this case: the question raised here depends upon the consideration, how far the defendant is exempted from liability by having been subjected to the fraud of another person. The plaintiff relies upon the custom of the trade, as entitling him to charge the defendant with the price of the earrings: how far that may assist him, it is unnecessary now to say: but upon a review of all the facts before us it is pretty clear to my mind what the result of the action will be. If the summons under Order XIV. had come before me in the first instance, I should not have exercised my discretion in favour of the plaintiff: for he had previously taken proceedings against the defendant in the Court of Bankruptcy which had failed, and he had not appealed from the registrar's decision; but the master and the judges of the Exchequer Division have exercised their discretion in his favour, and I cannot say that they have arrived at a wrong conclusion. I have only to add that I agree with the judgments of the other members

(1) 16 Q. B. 493; 20 L. J. (Q.B.) 167.

of the Court, and that in my opinion *Runnacles* v. *Mesquita* (1) has nothing to do with this case.

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Appeal dismissed.

Solicitor for plaintiff: *A. Leslie.*
Solicitor for defendant: *T. C. Russel.*

COLLETT *v.* DICKENSON.

April 5, 9.

Married Woman—Separate Estate—Action for Debt contracted as Feme Sole—Trustee not a Party—Form of Order.

An action was brought against a married woman for a debt contracted with a creditor who believed her to be a feme sole. She pleaded coverture, and the husband was then made a party. It was alleged that she had separate estate. At the trial it was declared that her separate estate was chargeable with payment of the debt and costs, and an inquiry was directed to ascertain of what her separate estate consisted, and in whom it was vested. In answer to the inquiry the master certified that the separate property consisted of an annuity, secured by the covenant of the husband contained in a separation deed and vested in a trustee. On a summons by the plaintiff to shew cause why he should not be at liberty to sign judgment, and the trustee not being a party:—

Held, that the Court could only make an order declaring the debt (with interest), and the taxed costs of the plaintiff, to be a charge upon the annuity, but without prejudice to any claim by the trustee.

THIS case is reported 11 Ch. D. p. 687.

(1) 1 Q. B. 416.

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June 30.

NEALE AND OTHERS *v.* CLARKE AND OTHERS.

Practice—Costs—Claim exceeding 50*l.—Recovery of less than* 20*l. in Contract—Counter-claim and Set-off—County Courts Act*, 1867, *s.* 5—*Judicature Act*, 1873, *s.* 67.

The plaintiffs claimed on a balance of accounts a sum of money exceeding 50*l.* The defendants denied their indebtedness, and pleaded by way of set-off and counter-claim that the plaintiffs were indebted to them for money advanced and money due for work done, and goods sold and delivered, and they claimed a balance on the accounts in their favour exceeding 50*l.* The cause was referred to an arbitrator, costs to abide the event. The arbitrator found that the defendants were indebted to the plaintiffs in a sum exceeding 50*l.*, and that the plaintiffs were indebted in like manner to the defendants in a sum exceeding 50*l.*, but that a balance was due to the plaintiffs on the whole account of 11*l.* 10*s.* 3*d.* :—

Held, by Kelly, C.B., that the plaintiffs and the defendants were each entitled to the costs of the issues on which they had succeeded, on the ground that the relief sought could not be given in a county court; and by Hawkins, J., contrary to his own opinion, but on the authority of *Potter* v. *Chambers* (4 C. P. D. 457), that the plaintiffs were entitled to their general costs of action.

THIS was an application for an order calling on the defendants to shew cause why the costs of the cause should not be taxed and paid to the plaintiffs. The facts of the case are stated in the judgment of Kelly, C.B.

March 27. *A. T. Lawrence*, for the plaintiffs, contended, on the authority of *Potter* v. *Chambers* (1), that the plaintiffs were entitled to their costs, and cited *Blake* v. *Appleyard* (2), and *Foster* v. *Usherwood*. (3)

F. A. Bosanquet, for the defendants, contended that the plaintiffs having recovered 11*l.* 10*s.* 3*d.* only, the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 7), deprived them of costs, and that the defendants' set-off and counter-claim in this action were equivalent to a set-off before the Judicature Act. He cited *Garnett* v. *Bradley* (4), and *Walesby* v. *Goulston*. (5)

A. T. Lawrence, in reply.

Cur. adv. vult.

(1) 4 C. P. D. 457.
(2) 3 Ex. D. 195.
(3) 3 Ex. D. 1.
(4) 3 App. Cas. 944.
(5) Law Rep. 1 C. P. 567.

June 30. KELLY, C.B. In this case the writ was issued on the 12th of June, 1877; and by the statement of claim the plaintiffs demanded 1029*l.* 15*s.* 6*d.*, admitting that this sum was reduced, by payment, to 280*l.* 12*s.* Particulars of the claim were delivered, claiming the above sum of 1029*l.* 15*s.* 6*d.*, and giving no credit, either for payment or set-off. Defendants, who were executors of Thomas Clarke deceased, by their statement of defence, denied the plaintiffs' claim to 1029*l.* 15*s.* 6*d.*, or any part of it, and claimed payment and set-off for money advanced, money had and received, work and labour, goods sold, and a counter-claim; and also claimed a balance to be due to them upon the whole account of 200*l.*

On the 18th of May, 1878, the cause was referred to an arbitrator; costs of the cause to abide the event; costs of the reference and award to be in the discretion of the arbitrator.

On the 28th of June, 1878, the arbitrator awarded that the defendants became, and were indebted to the plaintiffs, in respect of their total claim, in the sum of 1067*l.* 0*s.* 6*d.*; and that plaintiffs were indebted to the testator and the defendants, in respect of the set-off and counter-claim, 1055*l.* 10*s.* 3*d.*; and that the defendants were entitled to set-off this amount against the amount established by the plaintiffs; leaving a balance due from defendants to plaintiffs, upon the whole account, of 11*l.* 10*s.* 3*d.*; plaintiffs to sign judgment for this sum; and he awarded that the defendants should pay all the costs of the reference and award.

The question is, whether by reason of the balance thus finally recovered being under 20*l.*, the plaintiffs become disentitled, under the County Courts Act, 1867, to the costs of the action. And this question was referred by Mr. Justice Field to this Court.

It thus appears, and it lies at the root of the case, that if this action had been brought in the county court, that Court must, at the outset of the trial, have received evidence upon the question, whether the plaintiffs, independently of the set-off and counter-claim, could establish a demand of 1029*l.* 15*s.* 6*d.*, or to the sum to which they had reduced their claim, viz., 280*l.* This the county court had no jurisdiction to do. It became indispensable that this should be ascertained in the first instance, because the defendants had expressly pleaded, and it was the first issue joined

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in the cause, that no such sum as 1029*l.* 15*s.* 6*d.* was due to the plaintiffs. And if that were so, as it undoubtedly was, whatever in the course of the trial might have been proved, as to payment, set-off, or counter-claim, on the part of the defendants, the Court could not enter upon those questions until the first issue thus joined and arising should be determined; so the case came expressly within the words of s. 67 of the Judicature Act, 1873, that "the relief sought by the plaintiffs can be given in the county court." And even if at that period of the cause the plaintiffs had repeated their admission, in the statement of claim, that by payment, or in any other way, the claim to 1029*l.* 15*s.* 6*d.* had been reduced to 280*l.* 12*s.*, still that sum being beyond the jurisdiction of the county court, that Court had no power to proceed.

Many cases have been cited in which the 5th and 7th and other sections of the County Courts Act, 1867, applied to deprive the plaintiff of his costs, on the ground that he had not recovered a sum (in actions of contract) exceeding 20*l.*, or where the sum indorsed on the writ did not exceed 50*l.*; but in all these cases the relief sought could have been given in the county court. So, though the claim originally exceeded 50*l.*, if it be reduced by payment and admitted set-off or otherwise to a sum not exceeding 50*l.*, an application may be made to a judge at chambers to order the action to be tried in the county court; but no such application has been made or could have been made here. The fact therefore remains, and governs the whole trial of the cause, that for the reason before assigned relief could not have been given in the county court.

Thus, in *Ashcroft* v. *Foulkes* (1), it was held that where an action might have been brought in a county court, and the plaintiff might accordingly have exhibited his plaint in the county court, and where he established a claim to 37*l.* 10*s.* 3*d.*, after giving credit for 20*l.*, and where on the trial the 37*l.* 10*s.* 2*d.* was reduced by payments and by set-off to the sum of 4*l.*, for which a verdict was obtained for the plaintiff, it was held that the plaintiff, inasmuch as he might have brought the action, and the action might have been tried in the county court, was not entitled to recover

(1) 18 C. B. 261.

his costs. But that case, which was decided in 1856, has no application to the present, on the plain ground that the action might have been brought or the plaint levied in the county court. Here it is clear that the action could not have been brought or tried in the county court, because, as before observed, the action was brought to recover, and issue was joined, and must have been tried at the outset, whether the plaintiffs were entitled to recover 1029*l.* 15*s.* 6*d.*, and so relief was sought which could not be given in the county court. The case of *Osborne* v. *Homburg* (1) merely decides that the section which enacts that application may be made to have a case tried in the county court if the claim indorsed on the writ exceed 50*l.*, but is reduced by payment to a sum not exceeding 50*l.*, does not apply where a payment is made after action brought; and this has no bearing upon the present case. This decision was confirmed by the Court of Appeal in the case of *Foster* v. *Usherwood* (2), where it was held that s. 7 of the County Courts Act of 1867 does not give the county court jurisdiction to hear causes sent down from a superior Court, where the claim indorsed upon the writ of summons has been reduced below 50*l.* by payment into court after action brought. So in *Moore* v. *Watson* (3), where an action of contract had been compulsorily referred to a master under s. 3 of the Common Law Procedure Act, 1854, and it was ordered that the costs of the cause should abide the event, and the costs of the reference should be in the discretion of the arbitrator; and the master having awarded to the plaintiff a sum less than 20*l.*, plaintiff was not entitled to costs. Here, again, it was clear that the action might have been brought, and proceeded to a verdict and judgment in the county court, that Court having jurisdiction to try every issue which did arise or could have arisen in the cause.

In *Cowell* v. *Amman Colliery Co.* (4) the award was that the plaintiff was entitled to a sum not exceeding 20*l.*, and the plaintiff recovered that sum accordingly. The Queen's Bench held, after conference with the judges of the Common Pleas and Exchequer, that the plaintiff was not entitled to his costs; but in this case, as in all the others cited, the action being brought to recover a sum

(1) 1 Ex. D. 48.
(2) 3 Ex. D. 1.
(3) Law Rep. 2 C. P. 314.
(4) 6 B. & S. 333; 34 L. J. (Q.B.) 161.

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under 50*l.* might have been brought and tried in the county court, and so relief might have been sought and given in the county court. All these cases were decided before the passing of the Judicature Act, 1873; and besides in them all the sums recovered by the plaintiffs might have been recovered in the county court.

No case has been cited, or exists, in which the demand in the writ and in the statement of claim is of a larger amount than 50*l.*, and the defendant denies that that sum is due, and issue is joined thereon, so that the Court must proceed to try the question whether such larger sum is due or not, in which it has been held that the county court has jurisdiction, and consequently that relief could be given in the county court.

As to the cases decided in the last century, and for some little time afterwards, under the statute of George II. (1), I think they have no application whatever to the present case. In those times no county courts were in existence, and no questions could arise, respecting the right to costs, by reason of bringing actions in the superior Courts, where recovery might be had, and justice done, in an inferior Court. The object of those Acts was fully attained by the defendants where they set up, and succeeded in establishing, a complete defence to the action of the plaintiffs, being entitled, as in all other cases, to their costs; and it was not unreasonable that the legislature should have entitled a defendant to his costs, where, by overtopping the plaintiffs' demand by means of a set-off, he obtained a verdict and judgment in the cause. Now, however, that the county courts have been established throughout the kingdom, and the Judicature Act has established as law the 67th section of the Act of 1873, in addition to the many other provisions of the County Courts Acts, the principle to be deduced from the whole legislation and law upon the subject is, that if the county court has jurisdiction to try the cause and do full justice to both parties, the plaintiffs shall be bound to sue in the county court under peril of losing their costs, unless they recover at least 20*l.* in actions of contract, and 10*l.* in actions of tort.

Finally, I hold that the proposition which decides this cause is that upon the first issue joined, which the Court that tries the cause is compelled, at the outset of the trial, to proceed to try

(1) 8 Geo. 2, c. 24.

upon the evidence, namely, whether the plaintiffs were entitled to recover 1029*l.* 15*s.* 6*d.*, or, at least, 280*l.* 12*s.*, either of which sums is beyond the amount recoverable in a county court, and that this issue the county court has no jurisdiction to deal with upon the trial. The law, were it otherwise, would be most unreasonable and unjust. It must be remembered that at the time when the plaintiff issued his writ, he must determine what the amount is which he has to claim in the action. He may indeed know that the defendant has a claim against him, to a set-off of several demands; but he has no power to compel the defendant to plead a set-off, and he knows not to what amount, especially in a complicated account, he can establish his set-off if he should plead it. Even if he had the gift of prophecy, and foreknew the amount which could be established, he has no power to compel the defendant to plead it by way of set-off. He knows that the defendant may have good reasons for not pleading it, as that a witness is abroad, or not at hand, or that from other causes he is not able or willing at that time to enforce his demand. If the plaintiffs could guess the amount which could be established against them (in this case it was 1055*l.* 10*s.* 3*d.*), and deduct that sum from the amount which they knew they should be able to prove to be due to themselves and were to bring an action for the balance only of 11*l.* 10*s.* 3*d.*, stating it to be as it really was, the balance of a large account, exceeding 1000*l.* on each side, between themselves and the defendants, I do not see what would prevent the defendants from paying that small sum into court, together with the costs of the action up to that time, and afterwards bringing their action against the plaintiffs for upwards of 1000*l.*, which they could prove that they were entitled to by way of set-off.

Finally, this action having been brought and tried upon two issues joined between the parties, the one, whether the plaintiffs were entitled to a sum of 1029*l.* 15*s.* 6*d.*, or, as it turned out, of 1067*l.* 0*s.* 6*d.*, and the other, whether the defendants were entitled to set-off and counter-claim to the amount of 1055*l.* 10*s.* 3*d.*; both of which sums were beyond the jurisdiction of the county court, that Court had no power to try these issues in the cause, and consequently the plaintiffs were by law justified in bringing the action in a superior Court, from which it was referred to arbitration; and

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the plaintiffs having established their claim to one of these large sums, and the defendants to the other, I am of opinion that as the plaintiffs have obtained the award, and judgment in their favour for 11*l.* 10*s.* 3*d.*, the plaintiffs are entitled to the costs of the issue found for them; and the defendants to their costs, in respect of the issue upon which they have succeeded, and that our judgment ought to be pronounced accordingly.

I have thought it right to state the grounds of my opinion fully and explicitly, and especially with reference to the former state of the law, and to the authorities which have been cited; chiefly because, I regret to say, that my learned Brother Hawkins takes a different view of this case from my own; but in truth the whole question and the case itself are concluded by a clear and decisive authority directly in point by the Court of Queen's Bench; from which, even if my opinion were against it, I should not consider this Court at liberty to depart. In the case of *Potter* v. *Chambers* (1) the plaintiff brought his action for 114*l.* 8*s.*, which the defendant denied that he owed to him, and pleaded a set-off and counter-claim to the amount of 109*l.* 16*s.* Both parties succeeded in establishing their respective claims, and the verdict and judgment were entered for the plaintiff for the balance of 4*l.* 12*s.*, and no more. The arguments which have been urged in this case were addressed to the Court, first upon a motion by the defendant to enter the judgment distributively for each party (2), which was refused; and afterwards for a review of the taxation of costs by the master, who had taxed them in favour of the plaintiff. The Court after full consideration held that the 67th section of the Judicature Act, 1873, had no other application to the case than that the plaintiff could not have obtained relief in the county court, and therefore was entitled to bring his action in the superior Court, and accordingly held the plaintiff entitled to his full costs.

HAWKINS, J. The question in this case is one of great practical importance, viz., whether where a plaintiff in an action in a superior Court establishes an original claim to an amount exceeding that over which a county court has jurisdiction, but which by

(1) 4 C. P. D. 457; 48 L. J. (N.S.) Q. B. 274.

(2) See *Potter* v. *Chambers*, 4 C. P. D. 69.

set-off is reduced to or below the sum of 20*l.* in contract, or 10*l.* in tort, the 5th section of the County Courts Act, 1867, as limited by the 67th section of the Judicature Act, 1873, operates so as to deprive him of his costs of suit.

It came before us in the shape of an application to review the taxation of the master who had declined to tax the plaintiffs their costs under these circumstances.

The plaintiffs on the 12th of June, 1877, issued a writ against the defendants as executrix and executor of Thomas Clarke, deceased, claiming by the indorsement a sum of 1029*l.* 15*s.* 6*d.* for money had and received by the testator for the plaintiffs. By their statement of claim delivered the 8th of August, 1877, the plaintiffs alleged that the testator as agent for the plaintiffs received for them divers sums of money, and paid over to them divers small sums, leaving a balance of 280*l.* 12*s.* still due to them. Particulars of the plaintiffs' demand were delivered on the 20th of August, setting forth the items as due to the plaintiffs amounting to 1029*l.* 15*s.* 6*d.*, but allowing no credits to the defendants. By the statement of defence, delivered the 7th of November, 1877, the defendants denied the claim, and also alleged payment and pleaded set-off and counter-claim for money advanced, money had and received, work and labour done, and for goods sold and delivered (all matters of pure set-off), and they claimed from the plaintiffs 200*l.* as a balance due to them, the defendants. Upon this statement of defence issue was joined. On the 18th of May, 1878, by consent "the cause" was referred to an arbitrator upon the following (amongst other) terms, viz., "that the costs of the said cause shall abide the event, and that the costs of the reference and award shall be in the discretion of the said arbitrator." On the 28th of June, 1878, the arbitrator made his award, and by it found that the testator in his lifetime, and the defendants as his personal representatives became and were indebted to the plaintiffs in respect of their claim in the total sum of 1067*l.* 0*s.* 6*d.*, and he found with respect to the set-off and counter-claim that the plaintiffs became and were indebted to the testator in his lifetime, and to the defendants as his personal representatives in 1055*l.* 10*s.* 3*d.*, and that the defendants were "entitled to set-off and counter-claim such last mentioned sum against the amount

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found to be due on the plaintiffs' claim," leaving thus a balance of 11*l.* 10*s.* 3*d.* due from the defendants to the plaintiffs, for which balance the plaintiffs were entitled to sign final judgment, which they did—and he directed the defendants to pay all the costs of the reference and award.

Upon the plaintiffs carrying in their costs of the cause for taxation the master disallowed them, on the ground that the plaintiffs having recovered a sum not exceeding 20*l.*, were by reason of the County Courts Act, 1867, disentitled to them. On appeal made to Field, J., at chambers for an order to review this taxation, he referred the matter to this division, and hence we are called upon to decide it.

It has been long since established that no matter how the claim of a plaintiff may be reduced, whether by proof of payment, set-off, or otherwise, the sum for which he is entitled to sign judgment is the sum "recovered" within the meaning of the County Courts Acts: *Ashcroft* v. *Foulkes* (1); *Osborne* v. *Homburg* (2); *Foster* v. *Usherwood.* (3) See also *Staples* v. *Young.* (4)

It must also be considered as settled that where by an order of reference the costs of the cause are "to abide the event," it means the event with its legal consequences, and those words have no effect to entitle the plaintiffs to costs if he would otherwise be deprived of them by the operation of the County Court Acts: *Cowell* v. *Amman Colliery Company* (5); *Moore* v. *Watson.* (6)

In the present case the event of the award is that the plaintiffs have recovered a sum not exceeding 20*l.*, and consequently under s. 5 of the County Courts Act, 1867, would not have been entitled to any costs of suit, in the absence of a certificate or order as mentioned in that section. The 67th section of the Judicature Act, 1873, however limited the operation of that 5th section to actions "in which any relief is sought which can be given in a county court." It remains, therefore, to be seen whether the "relief sought" by the plaintiffs in this action could be so given. Now what within the meaning of s. 67 is the relief which is sought by a plaintiff in an action? It cannot be determined by

(1) 18 C. B. 261.
(2) 1 Ex. D. 48.
(3) 3 Ex. D. 1.
(4) 2 Ex. D. 324.
(5) 6 B. & S. 333; S. C. 34 L. J. (Q.B.) 161.
(6) Law Rep. 2 C. P. 314.

the amount indorsed on the writ, or that claimed in the statement of claim. So to construe the words would in effect put it in the power of a plaintiff in all cases to evade the operation of the County Courts Act, by making a claim exceeding 50*l.*, regardless of what he might ultimately recover, or even seek to establish by evidence. Neither can those words mean the sum to which the plaintiff bonâ fide believes himself entitled, for that might be to make the costs dependent on the moderation or extravagance of the plaintiff's views. Some limitation must be put upon these words, and, after much consideration, it seems to me that the "relief sought" may most reasonably be interpreted to mean that amount or balance which is really due to, and which the plaintiff is entitled to sue for and recover, without foregoing any portion of his just demand, that is, the relief to which he is entitled, and that is, in my opinion, the relief he seeks in the action within the meaning of the 67th section of the Judicature Act, 1873.

In considering this question in cases where the plaintiff's original claim, so far as it is unextinguished by payment, and at the commencement of the action exceeds 50*l.*, and so is beyond the jurisdiction of the county court, but is reduced below that sum by matter of defence which falls short of shewing that the debt was to that extent extinguished, as, for instance, by payment before the writ was issued; it is all important, in my view, to bear in mind the distinction between that which is matter of defence in the nature of set-off as allowed by the statute of Geo. II., and that which is matter of pure counter-claim as allowed by the Judicature Act, 1873, and the orders framed thereunder. Both set-off and counter-claim under the Judicature Act are in one sense cross-actions, but there is a wide difference between them. A set-off is a debt allowed by the statute of Geo. II. to be set-off against another debt, and for it the plaintiff may in his particulars give credit so as to prevent the defendant from again setting it up. A counter-claim, as distinguished from a set-off allowed by the statute of Geo. II., is nothing but a mere cross-action, allowed by the legislature to be pleaded at the defendant's option, in order to avoid multiplicity of suits between the same persons; but in no case can the plaintiff compel the defendant to set up his counter-claim, and under no circumstances is he empowered to give credit

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to the defendant for what he conceives to be due upon it, so as to make that credit binding on the defendant. It is entirely in the option of the defendant to set up his counter-claim, or to reserve it as the subject of an action in which he will be the plaintiff. It is essential, therefore, that a plaintiff should in all cases where a counter-claim is all that can be opposed to his action, sue for the whole amount of his demand, and unless the defendant thinks fit to avail himself of the privilege allowed him by the Judicature Act, he is entitled to recover that amount in its integrity. In such a case he cannot, according to my construction, obtain the relief he seeks in the county court. He cannot, however willing he may be to do so, give credit for the counter-claim, and sue for what he conceives to be the just balance due to him.

Before the coming into operation of the County Court Rules allowing a plaintiff to give credit for a set-off in his particulars, the law was the same with regard to set-off. For although the statute of Geo. II., where there were mutual debts between the plaintiff and the defendant, allowed one debt to be set against the other it left it optional with a defendant to avail himself of that privilege, and so the law remained until the General Rules of Trinity Term, 1853, when by Rule 13 the plaintiff, in order to save the expense of a plea of set-off was permitted to give credit for a set-off in his particulars. This privilege, however, was not accorded to suitors in the county courts until the 35th of the County Court Rules of 1856 (made under 19 & 20 Vict. c. 108, s. 32), took effect. It will be useful to bear in mind that it was with reference to the law as it stood before that period that it was held in *Woodhams* v. *Newman* (1), in 1849, *Beswick* v. *Capper* (2), *Turner* v. *Berry* (3), in 1850, and other cases which I need not mention, that a claim reduced by set-off within the jurisdiction of a county court did not fall within the operation of the then existing County Courts Act. The reason of these decisions is thus expressed by Pollock, C.B., in *Turner* v. *Berry* (3). Speaking of a set-off, he said: "It is in the nature of a cross-action, and you cannot compel a man to set-off his claim, or accept credit for it against another." The case of *Walesby* v. *Goulston* (4), which was cited and relied on

(1) 7 C. B. 654.
(2) 7 C. B. 669.
(3) 5 Ex. 858.
(4) Law Rep. 1 C. P. 567.

as a strong authority (as undoubtedly it is) in favour of the plaintiff's right to his costs, was, it is true, decided in the year 1866, long after the County Court Rules to which I have referred. The question in that case arose under the 24th section of the County Courts Act, 1856 (19 & 20 Vict. c. 108), by which jurisdiction was given to a county court to try actions where "the debt or demand claimed consists of a balance not exceeding 50*l.* after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff. The Court held that "admitted set-off" meant a set-off admitted before action brought. Erle, C.J., adding, "No doubt the plaintiff might have admitted the set-off and issued a plaint in the county court, but, in my opinion he had an option whether he would make the admission or not." It is manifest, on reading the report of that case, that Willes, J., did not cordially acquiesce in that decision.

Before discussing the 5th section of the County Courts Act, 1867, it will be convenient shortly to summarize the substance of the statutory enactments touching the subject in question, up to the passing of that Act. By the original County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 129, a plaintiff who recovered in a superior Court less than 20*l.* in contract or 5*l.* in tort for a cause, for which "a plaint might have been entered in the county court," was entitled to such sum only and no costs. But to deprive him of such costs, it was necessary to enter a suggestion on the roll—an inconvenient and expensive process. By 13 & 14 Vict. c. 61, s. 1 (passed in 1850), the necessity for a suggestion on the roll was superseded; and the plaintiff who recovered a sum not exceeding 20*l.* in contract or 10*l.* in tort, was entitled to judgment for such sum only and no costs, though power was given by ss. 12 and 13 to the Court or a judge to direct that the plaintiff should recover his costs if, inter alia, "the action was brought for a cause for which no plaint could have been entered in the county court." By s. 4 of 15 & 16 Vict. c. 54 (1852), it was made imperative upon the Court or judge so to direct in the event last mentioned.

In this state of things it was that the County Courts Act, 1867, was passed, by the 5th section of which it is enacted that "if in any action commenced after the passing of this Act in any of her Majesty's Superior Courts of Record, the plaintiff shall recover a sum not exceeding 20*l.* if the action be founded on contract, or

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10*l.* if founded on tort, he shall not be entitled to any costs of suit unless the judge certify that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs." It will be observed that by this section there is no reservation of any right to costs, even in actions which could not by law, even with the consent of both parties, be instituted in the county court; such for instance as actions for breach of promise of marriage, and slander. It is clear that under this section the plaintiff, whose claim (in contract) for a sum far beyond the county court jurisdiction was reduced to or below 20*l.* by set-off, would not have been entitled to any costs unless he obtained such certificate or order, the granting of which was entirely a matter of discretion.

The effect of this was practically to deprive of all remedy or relief many of those who had small causes of action for matters over which the county court had no jurisdiction. It was to remedy this state of things, and not to confer upon any plaintiff an option to sue in a superior or a county court, that the 67th section of the Judicature Act, 1873, whilst it preserved the 5th section of the County Courts Act, 1867, limited its operation to actions in which "any relief is sought which can be given in a county court." Upon these words it is this question now arises. Could the relief sought by the plaintiff be given in a county court? I answer that question by saying it could, had the plaintiff thought fit to adopt the proper means to obtain it.

I have already referred to the 35th rule of the County Court Rules of 1856; I have now to call attention to the County Court Orders of 1875. By Order VII., rule 1, after requiring the plaintiff at the time of the entry of his plaint to file particulars of his demand, it is provided that, "Where the demand exceeds 50*l.*, but the plaintiff desires to abandon the excess, or to admit a set-off, and sues in the county court for the residue, the abandonment of the excess or the admission of the set-off shall be entered at the end of the particulars;" and by Order VIII., rule 4, the particulars are to be deemed to be part of the summons to the defendant to appear. In the present case it is clear the plaintiffs might have given the defendants credit for their set-off, and obtained in the county court all the relief which by the award they have been found entitled to, viz. the balance of 11*l.* 10*s.* 3*d.*

I do not feel pressed by the earlier authorities.

First, because of the County Court Rules permitting a plaintiff to give credit for a set-off which he could not have done before 1855.

Secondly, because it was obviously the intention of the legislature in passing the 5th section of the County Courts Act, 1867, to deprive plaintiffs of costs in all cases where the sums recovered were within the prescribed amounts, and it must not be forgotten that that Act was passed within a year after the decision in *Walesby* v. *Goulston*. (1)

Thirdly, because the language of the 67th section of the Judicature Act, 1873, differs from that used in the County Court Acts, and I think the legislature did not intend to reserve, and has not reserved, to plaintiffs any option to sue in the superior Court in cases like the present, but has only removed from the operation of the 5th section of the County Courts Act those actions in which the relief sought could not be given in a county court. To hold otherwise would be to put it in the power of any plaintiff with whom a debt of 51*l*., made up of a number of small items, had been incurred to sue in a superior Court and recover his costs, though his claim might be reduced to 20*s*. by a set-off which he knew to be due, but obstinately refused to give credit for.

It was urged that to compel a plaintiff to give credit for a set-off, at the peril of losing his costs in the event of his not recovering more than 20*l*., would be to impose a difficulty upon him, for that he might be unable to determine the exact amount of his indebtedness to the defendant. I fail to see the force of this argument; every defendant is placed in a similar difficulty. When sued by a plaintiff he has to determine the amount he will pay into court. Moreover, it must not be forgotten that the judge or Court has power in all cases to award, or deprive of, costs if the circumstances of any particular case should make it expedient that he should do so.

I desire, however, to say that my judgment is intended to apply only to cases of strict set-off of mutual debts under the statute of Geo. II., not to cases where a plaintiff's claim is reduced by a counter-claim as allowed to be set up for the first time by the

(1) Law Rep. 1 C. P. 567.

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Judicature Act and Orders. Such a counter-claim is in the nature of a pure cross-action, for in it the plaintiff has no power to give credit in his particulars, nor can he compel the defendant to set it up in his defence. He has therefore no option but to sue for his whole demand, and unless he does so he cannot obtain the relief to which he is entitled, and if he succeed in establishing his own claim to an extent exceeding 50*l.* he is, in my opinion, entitled to his costs, even though the defendant by a counter-claim may succeed in reducing the amount for which final judgment may be signed to a sum not exceeding 20*l.* in contract or 10*l.* in tort. More than this, I think he is entitled to his costs, even should the defendant succeed by means of his counter-claim in turning the balance in his own favour, and so entitle himself to judgment for that balance: see *Cole, Marchant, & Co.* v. *Firth* (1), decided by the Lord Chief Baron and Pollock, B., on the 12th of May last. The cases of *Staples* v. *Young* (2), *Blake* v. *Appleyard* (3), and *Potter* v. *Chambers* (4), have no bearing upon the matter now under discussion. I refrain, therefore, from discussing them.

I am aware that the view I have expressed may be thought not to accord with that taken in *Potter* v. *Chambers* (5). I cannot, however, help thinking that that case, which was very little argued, was decided upon the assumption that the plaintiff's claim was reduced below 20*l.* by counter-claim as distinguished from set-off. Nevertheless, as reported, that case certainly does appear to support the view taken by the plaintiffs, and I feel myself therefore bound by it. The question, however, is of such practical importance, that I have thought it right to express my own view upon the subject, though, of course, with great diffidence, seeing that my Lord entertains an opposite opinion.

The order of the Court will therefore be for the master to review his taxation.

Order to review the taxation.

Solicitors for plaintiffs: *Rooks & Co., for G. H. Saunders, Chipping Norton.*

Solicitors for defendants: *Mackeson, Taylor, & Arnould, for Kilby & Mace, Chipping Norton.*

(1) Post, p. 301.
(2) 2 Ex. D. 324.
(3) 3 Ex. D. 195.
(4) 4 C. P. D. 69.
(5) 4 C. P. D. 457.

COLE, MARCHANT, & CO. *v.* FIRTH AND ANOTHER.

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May 12.

By the statement of claim, the plaintiff sought to recover 404*l.* 17*s.* 9*d.* for work and labour done and material supplied by them as engineers. The statement of defence traversed the allegations of the claim, and alleged that the work was not according to contract and was useless to the defendants, and in a counter-claim the defendants alleged loss arising from the breach of contract of the plaintiff, and they claimed 480*l.* as damages.

The cause and counter-claim were referred to an arbitrator, "costs of the cause and counter-claim to follow the event, costs of the reference and award to be in the discretion of the arbitrator. The parties in whose favour the award should be made to be at liberty to sign judgment for all sums of money awarded as due to them, and for all costs to which they should be entitled."

The arbitrator awarded that the plaintiffs were entitled to recover 371*l.* in respect of their claim, and that the defendants were entitled to recover 375*l.* in respect of their counter-claim. And he awarded that the plaintiffs should pay to the defendants the balance of 4*l.* accordingly, and that the plaintiffs should bear the costs of the reference and award. The district registrar ordered judgment to be signed for the defendants for the sum of 4*l.* and for the costs of the cause, counter-claim, reference, and award to be taxed.

Upon appeal, Field, J., referred the matter to the Court.

R. O. B. Lane, for the plaintiffs, moved to vary the order.

Wills, Q.C. (with him, *Cyril Dodd*), for the defendant.

THE COURT (Kelly, C.B., and Pollock, B.) directed so much of the registrar's order as related to costs to be struck out and the following to be inserted instead thereof: "the costs of and relating to the plaintiffs' claim and the proof thereof to be paid by the defendants, and the costs of and relating to the defendants' counter-claim and the proof thereof to be paid by the plaintiffs."

Order accordingly. (1)

Solicitors for plaintiffs: *Layton & Jacques, for Watson & Dickens, Bradford.*

Solicitors for defendants: *Flower & Nussey, for Wood, Hellick, & Hutton, Bradford.*

(1) See *Chatfield* v. *Sedgwick*, 4 C. P. D. 459.

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July 2.

THE LOCAL BOARD OF HEALTH FOR THE DISTRICT OF THE PARLIAMENTARY BOROUGH OF MALTON, APPELLANTS; THE MALTON FARMERS MANURE AND TRADING COMPANY (LIMITED), RESPONDENTS.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55)—*Offensive Trades*—*Effluvia a Nuisance or injurious to Health.*

The case of an offensive trade causing effluvia is within s. 114 of the Public Health Act, 1875, if the effluvia, though not injurious to persons in sound health, cause sick persons to become worse.

Per STEPHEN, J.: It is not necessary, to constitute an offence under that section, that such effluvia, if they amount to a nuisance, should also be injurious to health.

Great Western Ry. Co. v. *Bishop* (Law Rep. 7 Q. B. 550) considered.

CASE stated by justices on a complaint by the appellants, as the urban sanitary authority for the district of the parliamentary borough of Malton, against the respondents, under s. 114 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), for unlawfully carrying on their trade so as to be a nuisance, and so as to cause effluvia which were a nuisance, and injurious to the health of the inhabitants of the district.

The respondents were the occupiers of certain buildings in which the process or manufacture of artificial manures (including bone manures and the dissolving of bones and coprolites with sulphuric acid, but not the boiling or burning of bones), was extensively carried on, and during the process of manufacture, or whilst the hot product was being moved after manufacture, or during the storage of material, effluvia were thrown off in large quantities, a considerable portion of which escaped from the buildings, and had been from time to time on certain occasions, but not continuously, according to the direction of the wind, blown or carried into some parts of the town forming the district of the sanitary authority. Numerous complaints had been made of a nuisance arising therefrom to the inhabitants, and the medical officer of health for the district certified to the appellants, under the provisions in that behalf of the 114th section of the Public Health Act, 1875, that the building or place in the occupation of the respondents used for the crushing and dissolving of bones, the

manufacture of manures, and the carrying on of the trade, business, process, or manufacture causing effluvia, was a nuisance, and injurious to the health of the inhabitants of the district, which certificate was put in evidence at the hearing of the complaint.

The evidence on behalf of the appellants went to shew that the effluvia were offensive, and had on the occasions in question materially interfered with the comfort and enjoyment of the inhabitants in the streets and at the Malton station of the North Eastern Railway Company, about 200 yards from the works; and that such effluvia penetrated into some of the houses within the district, causing the inhabitants to close their windows, and in one or two instances nausea and vomiting were attributed to it; but the appellants' principal medical witness did not think there was anything in the vapours to make people sick. The medical officer of health adhered to the statement in his certificate that the works caused a nuisance and effluvia which were injurious to health, whereas other medical men also called by the appellants, whilst giving it as their opinion that the effluvia might make sick people worse, and cause nausea, yet did not think any permanent injury to health would arise therefrom.

At the close of the case for the appellants it was contended, on behalf of the respondents, that this was not a nuisance proved to be injurious to health, and that under the wording of the 114th section of the Act, taken in conjunction with the definitions of nuisances liable to be dealt with summarily under the Act, and contained in the 91st section, particularly sub-s. 6, and also on the authority of the case *Great Western Ry. Co.* v. *Bishop* (1), the justices had no jurisdiction to determine summarily a charge of causing a nuisance preferred under the Public Health Act, unless such nuisance was proved to be injurious to health.

On behalf of the appellants, it was contended that *Great Western Ry. Co.* v. *Bishop* (1) did not govern the present case, inasmuch as it was decided under the old Nuisance Removal Act (18 & 19 Vict. c. 121), and that the nuisance complained of in that case was one which could not possibly have proved injurious to health, being a mere inconvenience, and therefore decided not to be within the scope of the Sanitary Act, but that the present

(1) Law Rep. 7 Q. B. 550.

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complaint was preferred under a special clause of the Public Health Act, 1875, dealing with offensive trades, and the nuisance complained of was one where it was possible injury to health might follow, and was within the strict meaning of the Act; and that the 114th section must contemplate that the justices had summary jurisdiction whether the business carried on was a nuisance simply, or that the business carried on caused an effluvium which was a nuisance, or whether there was a nuisance injurious to health, and that it was not necessary to prove it to be injurious to health.

The justices were of opinion that the appellants had proved a nuisance to exist in the ordinary sense of the word, yet that according to the provisions of the Public Health Act, 1875, and on the authority of the case quoted, it was necessary to be proved that the nuisance was likewise injurious to health, and on that point it did not appear that the case for the appellants was satisfactorily made out, it being shewn however that sick persons might to a certain extent suffer from it, but not permanently. They therefore dismissed the complaint.

The questions of law for the opinion of the Court were:

First. Was it necessary on the part of the appellants to prove as part of their case not only that a nuisance was caused by the effluvium, but also that it was injurious to the health of the inhabitants of the district?

Secondly. If the Court should so decide, then did the appellants sufficiently prove the effluvium to be "injurious to health," within the meaning of the statute, by evidence that some nausea that was felt was probably caused by it, and that it would make sick persons within its influence worse, though in the opinion of the principal medical witness it was not actually injurious to health?

Herschell, Q.C., for the appellants. It is sufficient that there is a nuisance, though it may not be injurious to health. The words of the section are "nuisance *or* injurious" to health, and no difficulty arises from the general character of the expression "nuisance," for the limited meaning to be attached to it is suggested by its occurring in a group of sections relating to offensive trade.

Cave, Q.C., for the respondents. The words in s. 114 are substantially the same as those in 18 & 19 Vict. c. 121, s. 27, and the case of *Great Western Ry. Co.* v. *Bishop* (1) shews that the word "nuisance" cannot be taken in its general meaning but as meaning a nuisance which in itself is injurious to health.

Herschell, Q.C., was not called on to reply.

KELLY, C.B., I should be sorry to put a construction upon this Act of Parliament which would prevent traders from carrying on their business in a reasonable way, with reference to the rights of their fellow creatures. But I am of opinion, on the facts disclosed by this special case, that the appellants are entitled to our judgment. That which must govern our decision is the language of the 114th section of the Public Health Act. Looking first, however, at the 112th section, it is clear that the object of this group of sections, under the heading "offensive trades," was to regulate noxious or offensive trades, businesses, or manufactures. The 114th section enumerates various places used for carrying on various trades, but includes in general words any place used for any trade, business, process, or manufacture causing effluvia. If such a place is certified to be a nuisance or injurious to the health, not of the inhabitants generally, but of any of them, complaint is to be made and an inquiry is to be held whether the business carried on is a nuisance, or causes any effluvium which is a nuisance or injurious to the health of any of the inhabitants of the district.

The question is whether, on the facts before us, it appears that the effluvium from this place is a nuisance or injurious to the health of any of the inhabitants of the district. The 6th paragraph of the case states that a nuisance had been proved to exist, and it is not necessary that there should be an injury to the health of the inhabitants generally. The Act requires that there should be an injury to the health of some of the inhabitants, and that, the the 6th paragraph shews, is the case. For in answer to the second question I am clearly of opinion that any effluvium such as that complained of, which had the effect of causing any person who is ill to become worse, is within the Act. The effluvium is the gravamen of the grievance complained of, and that has caused

(1) Law Rep. 7 Q. B. 550.

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sick persons to become worse. It is clear that this comes within the strict words of the Act as an injury to health, and the second question must be answered in the affirmative.

STEPHEN, J. There are two questions reserved by the justices. To the first of them I answer that it was sufficient to prove that, the manufacture being one causing effluvium, such effluvium was a nuisance whether causing injury to health or not. The four sections commencing with the 112th, relate to the subject of offensive trades, some of which are enumerated, and the others dealt with by general words. The 114th section speaks of effluvia which are a nuisance or injurious to health, and it is said this must be read as if it ran, "a nuisance injurious to health." I do not think that is its meaning, and it obviously is not its literal meaning. The way in which it is sought to shew that it is its proper meaning, is by reference to 18 & 19 Vict. c. 121, and the case of the *Great Western Ry. Co.* v. *Bishop* (1), decided on the construction of the 8th section of that Act. That decision, regard being had to the subject-matter of it, seems to me to come to this (a principle which is contained in part of the judgment of the Lord Chief Justice), that the word "nuisance" cannot there be taken in its fullest sense, as that would lead to some obvious absurdities. It is said then that, in the Act in question, the word must be restricted to nuisances affecting the public health, because that was the object of the Act, and must not be extended to nuisances with which it was not the intention of the Act to deal. Applying that principle to this enactment, it seems to me that in these sections the word nuisance must mean any nuisance connected with the carrying on of any offensive trade specified, and that the diminution of comfort thereby, is one of the nuisances included in the Act. I am not convinced by Mr. Cave's argument as to the analogous section of 18 & 19 Vict. c. 121, because the sections under this heading, "offensive trades," in the Act we are now considering, are complete in themselves.

In the view I take it is not necessary to decide the second question, but on this point I quite agree with my Lord. On a fair construction of the language used in the case, I think it is shewn

(1) Law Rep. 7 Q. B. 550.

that sick persons might suffer in their health, and that is an injury to health. I will only add that it seems to me that the kind of smell which makes sick people worse must interfere with the vigour and vitality of those who are well; but at all events it is sufficient to shew that sick persons are injured thereby.

Case remitted accordingly.

Solicitors for appellants: *Williamson, Hill, & Co., for Hugh W. Pearson, Malton.*

Solicitors for respondents: *Emmett & Son, for H. Jackson, Malton.*

LEFTLY *v.* MONNINGTON.

July 3.

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 2, 54—*Vestry —Member becoming Bankrupt—Churchwarden.*

A churchwarden of a parish named in Schedule B of the Metropolis Local Management Act, 1855, is a member of the vestry of that parish within the meaning of s. 54, and is liable to a penalty if, after becoming bankrupt, he acts as a member of such vestry.

CASE stated in an action to recover 50*l.* penalty and costs of suit against the defendant for voting, after being adjudicated a bankrupt, at a meeting of the vestry for the parish of Plumstead, contrary to the provisions of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 54.

On the 20th of August, 1878, and for some months prior thereto, the defendant was churchwarden of the parish of Plumstead, and by virtue of his office of churchwarden, and not otherwise, was part of the vestry of the parish. On the 14th of June, 1878, he was adjudicated a bankrupt. On the 20th of August, 1878, the defendant attended a meeting of the vestry of the parish of Plumstead, and acted at such meeting by voting upon a resolution submitted to the vestry meeting.

The 2nd section of the aforesaid Act provides that the incumbent and churchwardens of each of the parishes referred to in Schedule B (of which Plumstead is one) shall constitute a part of the vestry, and shall vote therein in addition to the elected vestrymen. Sect. 54 provides that any member of any vestry for any

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parish mentioned in the schedule who shall be declared bankrupt shall thereupon cease to be such member; and any person who acts as a member of such vestry after ceasing to be such member as aforesaid, and any person who acts as a member of any such vestry as aforesaid without being qualified by rating and occupation, as required by the Act, shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same.

The question for the opinion of the Court was whether the defendant, being a part of the vestry only by virtue of his office of churchwarden, was liable to the penalty?

W. M. Baylis, for the plaintiff, was not heard.

T. Willes Chitty, for the defendant. The 2nd section enacts that the incumbent and churchwardens shall be part of the vestry and vote in it, but that does not make them members of the vestry within s. 54. That section was intended to apply to elected members only, as is shewn by the reference to the qualification by rating and occupation. If it applies to churchwardens, it applies equally to the incumbent, which certainly was not within the evil aimed at. Besides, if the incumbent and churchwardens were all bankrupt, no vestry could be held: *Reg.* v. *Tottenham.* (1)

PER CURIAM (Kelly, C.B., and Stephen, J.). A person who is part of a vestry and votes in it cannot be otherwise than a member of it. The minute consequences of the Act may not have been considered, but there can be no doubt as to the meaning of the language used. The plaintiff is entitled to judgment with costs.

Judgment for the plaintiff.

Solicitor for plaintiff *E. Kimber.*
Solicitor for defendant: *T. Kipping.*

(1) 4 Q. B. D. 367.

[IN THE COURT OF APPEAL.]

1879
June 27.

MIDGLEY AND ANOTHER *v.* COPPOCK.

Vendors and Purchasers—Contract of Sale—Agreement by Vendor to discharge all "Outgoings" before the Completion of the Purchase—Charge upon Houses for Improvement of Street.

The plaintiffs bought of the defendant three houses, and by the contract of sale the latter agreed to discharge "all rates, taxes, and outgoings" up to the time of completion. The purchase was completed, and afterwards payment was demanded from the plaintiffs of the expenses incurred under a local Act in improving the street in which the houses stood. The work had been done some time before the houses belonged to the defendant, and at the time of sale to the plaintiffs neither party was aware of the charge. The plaintiffs, having paid the sum demanded, sued to recover the same from the defendant:—

Held, that the charge for improving the street was an "outgoing" which the defendant had bound himself to discharge, and that the plaintiffs were entitled to recover it from him.

ACTION to recover the sum of 70*l.* 19*s.* 3*d.*

At the trial before Lopes, J., the following facts were proved:—

By an agreement dated the 29th of June, 1877, the plaintiffs entered into a contract to buy of the defendant three houses called Richmond Terrace, Stockport Road, Manchester. The contract of sale contained the following clause: "All rent, rates, taxes, and outgoings payable in respect of the premises shall be received and discharged by the vendor up to the time of completion, such rents and outgoings being apportioned if necessary." The purchase was to be completed upon the 29th of July, 1877. In the year 1873 the corporation of Manchester, under the powers of the Manchester General Improvement Act, 1851 (1), had caused the street in which the houses stood to be paved, sewered,

(1) By the Manchester General Improvement Act, 1851 (14 & 15 Vict. c. cxix.), s. 15: "If any street or part of a street (not being a highway repairable by the inhabitants at large) which now is or shall at any time hereafter be formed or set out within the borough shall not be sufficiently sewered and drained, levelled, flagged, and paved, to the satisfaction of the council, it shall be lawful for the council, at any time and from time to time after the passing of this Act, by any writing under the hand of the town clerk, to order that any such street or part thereof shall be freed from obstruction, and sewered and drained, levelled, flagged, and paved, or otherwise completed, in such manner and within such time as the council shall order

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and drained, and a part of the sum due in respect of the houses, amounting to 70*l.* 7*s.* 5*d.*, remained unpaid. Upon the 28th of April, 1877, Rushton contracted to sell the houses, to the

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and direct; and thereupon the respective owners of the houses and ground lying alongside or adjoining to the said street, notwithstanding any parts of such street may include, pass over, lie opposite, or be adjacent to any cross or other street or any part thereof, shall within such time and in such manner as shall be expressed in such order, at their respective charges and expenses, remove all obstructions, and well and sufficiently sewer and drain, level, flag, and pave, or otherwise complete, such streets respectively."

Sect. 17: "If any such owners shall neglect or omit to remove the obstructions, and sewer, drain, level, flag, and pave, or otherwise complete such street or any part of such street within such time and in such manner as expressed in the said order, it shall then be lawful for the council to remove all obstructions, and to sewer, drain, level, flag, and pave, or otherwise to complete, as they shall think fit, the said street or such part thereof as shall not have been done pursuant to the said order, and to charge such respective owners with their several proportional parts of the charges and expenses thereof or which are incidental thereto, according to the extent of their respective houses and grounds lying alongside or adjoining to the said street, such share and proportion to be ascertained and settled by or under the direction of the said council; and all the charges and expenses which the council shall thereby sustain, incur, or pay, and shall so charge upon such owners respectively, shall, on demand, be forthwith paid and refunded to the council by such owners respectively, and, together with interest from and after the expiration of three calendar months from the date when the completion of the street shall . . . . be certified by the council, shall be recoverable by action of debt in any court of competent jurisdiction."

Sect. 18: "By way of additional remedy it shall be lawful for the council, whether any such demand shall have been made upon such owner or not, to require the payment of all or any part of such charges and expenses from the person, who shall then or at any time thereafter occupy any such houses or ground; and in default of payment thereof by such occupier, on demand by the council, the same may be levied by distress, and any justice may issue his warrant accordingly; and the owner shall allow every such occupier to deduct all sums of money which he shall so pay, or which shall be levied by distress, out of the rent from time to time becoming due in respect of the said houses or ground, as if the same had been actually paid to such owner as part of such rent."

Sect. 19: "In no case, except as hereinafter mentioned, shall any occupier be liable to pay more money in respect of such charges and expenses as aforesaid than the amount of rent due from him at the time of the demand made upon him for such charges and expenses, in case he shall pay the same or any part thereof, on demand, or at the time of the issuing the warrant of distress, or the levying thereof, in case such charges and expenses, or any part thereof, shall be levied by distress: Provided nevertheless, that if any occupier shall pay any rent to his landlord, after notice from the council delivered

defendant, but no conveyance to him was executed. The defendant having sold his right to the houses by the contract of the 29th of June above-mentioned, the conveyance to the plaintiffs was executed upon the 7th of August. The plaintiffs and the defendant at the time of both the contract and the completion were ignorant that any claim existed in respect of improving the street in which the houses stood. Afterwards the corporation of Manchester demanded payment of 70*l.* 7*s.* 5*d.*, which, together with 11*s.* 10*d.* for interest, was discharged by the plaintiffs. They now sought to recover these sums from the defendant.

Lopes, J., gave judgment for the defendant upon the ground, that the words, as to apportionment at the end of the clause, shewed that it was intended to extend only to such charges as were capable of being apportioned.

The plaintiffs appealed.

Edwards, Q.C., for the plaintiffs. The defendant agreed in express terms that he would discharge all "outgoings" becoming due before the completion of the purchase. The word "outgoing" has a very extended meaning, and is wide enough to include the charge for improving the street, which had existed ever since the year 1873.

Gorst, Q.C., and *J. F. Leese*, for the defendant. The expense of improving the street is a charge upon the person and not upon the property: it is a penalty imposed upon the owner for the time being: *Tidswell* v. *Whitworth*. (1) The work was done by

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to him personally, or left with some inmate at the place of his occupation as aforesaid, requiring him not so to do, such occupier shall be liable to pay in respect of such charges and expenses the amount of the rent so paid by him after such notice, or the same may be recovered from him by warrant of distress as aforesaid; and after any such notice shall have been delivered or left as aforesaid, it shall not be lawful for the landlord of the premises to which such notice applies to commence or prosecute any action at law for the recovery of rent for such premises until the charges and expenses on account of which such notice shall have been given shall be paid."

By the interpretation clause (s. 144), "the word 'owner' shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, or who would receive the same if such lands or premises were let at a rack-rent."

(1) Law Rep. 2 C. P. 326.

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the corporation of Manchester in 1873, when neither the plaintiffs nor the defendant were owners.

[BRAMWELL, L.J. *Tidswell* v. *Whitworth* (1) seems a clear case: the landlord was bound to level, sewer, and pave the street: this he failed to do, and then he wished to make his tenant liable for the consequences of his own default.

BRETT, L.J. The argument for the present defendant comes to this, that the plaintiffs were ill-advised to pay the amount claimed by the corporation.]

It is unnecessary to argue that the payment by the plaintiffs was voluntary: but at all events the defendant is not liable to the charge: the corporation had no remedy against the defendant. *Tidswell* v. *Whitworth* (1) is approved of and distinguished in *Thompson* v. *Lapworth.* (2) At all events, a sum equal to the rent of the houses during three months is all that the plaintiffs can recover from the defendant; for he was owner of them only during that period, and the plaintiffs are entitled merely to that sum, which he might have been compelled to pay. But, further, in any point of view, the expense of improving the street ceased to be an "outgoing" within the meaning of the contract of sale after the conveyance to the plaintiffs had been executed: their claim is really for compensation in respect of a diminution in the value of the hereditaments bought by them: but in the absence of fraud no compensation can be had after the purchase has been completed: *Manson* v. *Thacker.* (3)

[LORD COLERIDGE, C.J. *Manson* v. *Thacker* (3) is clearly distinguishable. The compensation there claimed was in respect of an alleged error or mis-statement in the particulars of sale: here the defendant expressly agreed to discharge all demands existing before the completion of the purchase, and the work was done some years before the contract of sale was entered into.]

Edwards, Q.C., was not called upon to reply.

LORD COLERIDGE, C.J. This is an appeal by the plaintiffs from a decision of Lopes, J., in favour of the defendant. The action was brought upon an agreement for the sale of certain heredita-

(1) Law Rep. 2 C. P. 326. (2) Law Rep. 3 C. P. 149.
(3) 7 Ch. D. 620.

ments, which contained a clause providing that all rates, taxes, and outgoings should be discharged by the vendor. The plaintiffs claimed a little more than 70*l.*, being the remainder of a certain sum said to be due, and, in fact, paid to the corporation of Manchester for improving the street in which the houses were standing. The plaintiffs, who had bought the houses of the defendant, were called upon to discharge the balance of a sum which the contract of sale did not state to be due. The question is whether the defendant is bound to repay that sum to the plaintiffs, who were compelled to liquidate it by virtue of the Act for the improvement of Manchester. We need not discuss all the sections which have been cited; but this at least is clear, that when the property subject to the charge is occupied by a tenant, that tenant can be made pay by the process contained in the section: that is to say, by successive distresses levied from time to time, he can be prevented from paying the rent to the landlord. I say nothing as to whether successive owners can be compelled to pay directly, and in their own persons, but they can be forced to pay through the pressure which can be put upon their tenants. If I am right in this view, the charge upon the hereditaments bought by the plaintiffs was clearly an "outgoing" recoverable from a tenant. All "outgoings" of this kind the vendor was by the contract of sale bound to discharge, and as he failed to fulfil his contract, he is liable to reimburse the purchasers, who are the present plaintiffs. The ground upon which Lopes, J., decided the present action has not been much argued before us. The learned judge based his judgment upon the words, "such rents and outgoings being apportioned if necessary." He was of opinion that these words shewed that the only "outgoings" to be discharged by the vendor were such as from their very nature were capable of being apportioned, and that the charge for improving the street, being incapable of apportionment was not an "outgoing" within the meaning of the clause. If the words "if necessary" had been left out of the clause in the contract there would have been great force in his view: but the effect of these words was in some degree overlooked by the learned judge. Some taxes, such as the property-tax, and some rates, such as the poor-rate, are apportionable, and accordingly would be apportioned under the clause: but the

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words, "if necessary," shew that it extends to "outgoings" which need not and cannot be apportioned. The charge for improving the street cannot be apportioned, and the defendant has not discharged it. I may add that I do not desire to say a single word in derogation of *Tidswell* v. *Whitworth*. (1) It was a case of landlord and tenant, and not of successive owners; the relation of vendor and purchaser was not present to the minds of the judges.

BRAMWELL, L.J. I am of the same opinion, and for the same reasons. Our judgment is not at all inconsistent with *Tidswell* v. *Whitworth* (1): there the landlord could not make the tenant pay for his own default. In *Manson* v. *Thacker* (2) the agreement relied on was for compensation in respect of any error or misstatement in the particulars of sale. In the action before us the plaintiffs rely upon an express contract by the defendant to discharge the amount, which they have been compelled to pay.

BRETT, L.J. I concur, and have only to add that the reasons assigned by Lord Coleridge are to be taken as the grounds of the decision of this Court.

Judgment reversed.

Solicitors for plaintiffs: *Pitman & Lane, for J. E. & R. Whitworth, Manchester.*

Solicitors for defendant: *Sewell & Edwards, for F. J Marlow, Manchester.*

(1) Law Rep. 2 C. P. 326. (2) 7 Ch. D. 620.

COBBOLD AND OTHERS *v.* PRYKE (ADMINISTRATRIX).

1879
July 12.

Practice—Administration Suit in County Court—Staying Actions in High Court—County Court Act, 1865 (28 & 29 *Vict. c.* 99), *s.* 1—*County Court Rules*, 1875, *Order II.—Judicature Act*, 1873, *s.* 24, *sub-s.* 5, *ss.* 89, 91.

Since the Judicature Act, 1873, a county court before which an administration suit is pending has no power to stay proceedings in the High Court, in respect of claims proveable in the administration suit.

MOTION for a rule calling on the county court judge of Suffolk to shew cause why a writ of prohibition should not issue, prohibiting him from maintaining and enforcing an order made by him under the following circumstances.

This action was commenced in the Exchequer Division of the High Court against the defendant as administrator of one Pryke, deceased. Subsequently proceedings were commenced in the county court at the suit of a creditor to administer the estate of the deceased, and a receiver was appointed. The county court judge made an order by way of injunction, restraining all further proceedings in the action in the Exchequer Division. This was the order complained of.

Poyser, for the plaintiff, in asking for a rule, pointed out that by the County Court Equitable Jurisdiction Act, 1865 (28 & 29 Vict. c. 99), s. 1, the county court had the power and authority of the High Court of Chancery, in all suits or matters therein mentioned, among which are suits by creditors and others for the administration of estates not exceeding 500*l*. Under this section the county court would have had power, before the Judicature Acts, to issue a restraining order, but that power is taken away by the Judicature Act, 1873, s. 24, sub-s. 5, since the Chancery Division could not now issue such an order, and the power of the county court is the same now as that of the Chancery Division.

Malden, for the receiver, shewed cause in the first instance, and contended that the county court judge had properly made the order, on the ground that the change of jurisdiction introduced by the Judicature Acts was not intended to affect county court procedure, except where expressly mentioned.

Poyser, was heard in reply.

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LORD COLERIDGE, C.J. I am of opinion that this rule should be made absolute. I think it clear that the jurisdiction to make the order which the county court judge made is now gone. The jurisdiction conferred by the County Court Act, 1865, so far as it relates to this case, was that county courts should have and exercise all the power and authority of the High Court of Chancery, in all administration suits where the sum involved does not exceed 500*l*. The Judicature Act, 1873, by s. 24, sub-s. 5, in terms directs that no cause pending in the High Court of Justice shall be restrained by prohibition or injunction. I agree that this would not in itself be conclusive of the matter, because as was pointed out in the course of the argument that appears to relate to proceedings within the Supreme Court of Judicature itself. It seems to me, however, that the jurisdiction conferred by the County Court Act, 1865, being that exercised by the High Court of Chancery, when this is taken away, the power of the Court which is to represent or stand in the place of the High Court of Chancery, and have and exercise the same power, is taken away also. Any doubt, however, is removed, when we look at s. 89 of the Judicature Act, because that section provides that an inferior Court, having jurisdiction in equity, shall grant relief in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice, and s. 91 applies the rules of law enacted by the Act to inferior Courts. Since then there is now by the Judicature Act no jurisdiction in the Chancery Division to make such an order as that appealed against, the power is taken away from the county court.

FIELD, J., concurred.

Order absolute for prohibition.

Solicitors for plaintiff: *Rhodes & Son, for Cobbold, Sons, and Rouse, Ipswich.*

Solicitors for receiver: *Baylis & Pearce, for S. Gooding, Ipswich.*

[IN THE COURT OF APPEAL.]

1879
Aug. 6.

SHELFORD *v.* THE LOUTH AND EAST COAST RAILWAY COMPANY.

Practice—Order XIV., Rule 1—*Writ specially Indorsed—Corporation Defendants.*

Where a writ is specially indorsed under Order III., rule 6, the plaintiff may apply for judgment under Order XIV., rule 1, though the defendants are a corporation.

THIS was an action in the Exchequer Division for services rendered by the plaintiff as engineer to the defendant company. The writ was specially indorsed under Order III., rule 6 with a claim for 2616*l.* 3*s.* 7*d.*, and interest on 2242*l.* 5*s.* 6*d.*, part of that sum, from the 31st of December, 1877, until payment, and 2*l.* 10*s.* for costs. The writ was issued on the 16th of June, 1879, and statement of claim delivered on the 3rd of July. On the same 3rd of July the plaintiff applied under Order XIV., rule 1, for leave to sign final judgment against the company. Master Pollock, without entering upon the merits, dismissed the application, on the ground that Order XIV., rule 1, did not apply where the defendant was a company. On the 5th of July a summons by way of appeal was taken out to review that decision. This summons was heard by Field, J., who, as it was stated, agreed in opinion with Master Pollock, but offered, if the plaintiff wished it, to refer the case to a Divisional Court. This was done, and a notice of appeal was accordingly given. On the 14th of July the Divisional Court (Lord Coleridge, C.J., and Field, J.) reversed the order of Master Pollock, and directed that the cause should be referred back to the master on the merits. This was done on the authority of *Muirhead* v. *Direct United States Cable Co.* (1) The company appealed from this decision.

Horne Payne, for the appellants. Order XIV., rule 1, does not apply where the defendant is a corporation, since a corporation cannot make an affidavit. The affidavit on the part of the plaintiff, as the rules originally stood, had to be made by the plaintiff

(1) 27 W. R. 708.

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SHELFORD v. LOUTH AND EAST COAST RAILWAY CO.

himself, and therefore it was held that a corporation could not apply: *Bank of Montreal* v. *Cameron*. (1) The original rule was altered by the order of May, 1877, as regards the plaintiff, but it has not been altered as regards a defendant. Rule 3 explains rule 1, and shews that the affidavit must be made by the defendant himself, the plaintiff therefore cannot have the benefit of this mode of proceeding against a corporation which cannot make one.

Moulton, contrà. The fact that the old rule did not apply to a plaintiff corporation, and that it was therefore thought right to alter it, does not affect the case. Rule 1, if fairly read, is clear as regards a defendant, he may satisfy the Court "by affidavit or otherwise."

[COTTON, L.J. I should feel no difficulty on rule 1 if it stood alone, but does not rule 3 interpret rule 1, and shew that the defendant must either make an affidavit or bring the money into Court?]

There is not enough in that rule to alter the meaning of rule 1, which clearly imports that the plaintiff is to have judgment, unless the judge is satisfied by sufficient evidence that on the merits the defendant ought to be allowed to defend.

Horne Payne, in reply.

JAMES, L.J. In my opinion the Court which decided on the meaning of rule 1 as it originally stood, was right in saying that with regret it was obliged to come to the conclusion that the words were such as to deprive a plaintiff corporation of a right enjoyed by other plaintiffs. By the alteration it was made clear that a corporation as plaintiff was to be on the same footing as other plaintiffs. It would be a singular state of things if a corporation when a plaintiff is to have the benefit of this rule, but is not to bear the burden of it when it is a defendant. Taking rule 1 by itself I cannot bring myself to doubt that the decision appealed from is clearly right. The Court or a judge may do certain things "unless the defendant by affidavit or otherwise" satisfies the Court or judge that he ought to be allowed to defend. The grammatical meaning of the words is that the defendant may

(1) 2 Q. B. D. 536.

satisfy the Court or judge by affidavit or by any other sufficient means. If "by affidavit" means "by the affidavit of the party defending" then "or otherwise" must mean "by some other means than the affidavit of the defendant." The substance of the rule is, that by the affidavit of the defendant, or in some other way, the facts must be brought before the judge so as to satisfy him. This appears to be the plain meaning of the rule taken by itself. Is this altered by rule 3? and does that rule compel us to read "or otherwise" in some non-natural sense? It would be unreasonable to give the subsequent rule such an effect on the main enactment. The only object of the words "in such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and to what part, of the plaintiff's claim" was to provide that the defendant must make it appear whether he was disputing the whole or part only of the plaintiff's claim, and it would not, in my opinion, be a legitimate construction to hold that they restrict the meaning of the 1st rule, so as to make "by affidavit or otherwise" mean "by affidavit made by himself or by payment of money into court." I am of opinion that Lord Coleridge, C.J., and Field, J., came to a correct conclusion, and that any evidence which satisfies the Court or judge is sufficient within the meaning of the rule, and that there is no reason for excluding from its operation a case where the defendant is a corporation.

COTTON, L.J. I said during the argument, and I adhere to the remark, that if rule 1 had stood alone I should have felt no doubt in the case. According to the plain terms of that rule the Court is not to make the order, if the defendant by affidavit or otherwise satisfies the Court of certain things. We cannot reject the words "or otherwise," they must mean by any other evidence to which the Court can look; and they can hardly be satisfied by referring them to payment into Court, since such payment cannot satisfy the Court that there is a defence on the merits. If, then, the words "by affidavit" are confined to an affidavit by the defendant, the words "or otherwise" must let in other evidence. I think, therefore, that the Court is not confined to an affidavit by the defendant himself, though an affidavit by the defendant ought

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SHELFORD v. LOUTH AND EAST COAST RAILWAY CO.

not to be dispensed with where he is a person who can make an affidavit. We, however, are dealing with a case where the defendant cannot make an affidavit. Even apart from the words "or otherwise" I am not satisfied that the words "by affidavit" ought to be confined to an affidavit by the defendant himself. In the *Bank of Montreal* v. *Cameron* (1) the Court was dealing with very different words—"The plaintiff may on affidavit verifying the cause of action and swearing that in his belief there is no defence to the action." It was, I think, rightly held that an affidavit of the plaintiff's belief must be an affidavit made by himself. In my opinion, therefore, that case is no authority for holding that, apart from the words "or otherwise," the affidavit on the part of the defendant must necessarily be made by himself.

As regards rule 3, though it might have been sufficient to confine the affidavit mentioned in rule 1 to an affidavit by the defendant himself, if the words "or otherwise" had not been found there, I agree that it is insufficient to confine the meaning of those words.

Appeal dismissed.

Solicitors for plaintiff: *Brooksbank & Galland.*
Solicitor for defendants: *W. R. A. Kime.*

(1) 2 Q. B. D. 536.

THE

LAW REPORTS.

Exchequer Division.

REPORTED BY

JAMES M. MOORSOM AND ALEXANDER MORTIMER,
BARRISTERS-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,
BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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OF

THE EXCHEQUER DIVISION

OF

THE HIGH COURT OF JUSTICE.

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Sir WILLIAM BALIOL BRETT,
Sir HENRY COTTON,
The Honourable ALFRED HENRY THESIGER,

} Ordinary Judges of Court of Appeal.

ERRATA.

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41	16 from bottom, after "*J. Brown, Q.C.*" insert		"(*Hollings*, with him)"
124	note at bottom of page	"ante"	"post"
152	4 from top	"1859"	"February, 1868"
152	5 from top	"February, 1868"	"1859"
179	14 from top	"allowed"	"overruled"
179	10 from bottom	"ought to be allowed"	"ought not to be allowed"
190	1 from top	"Ashendon"	"Ashenden"

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CASES

DETERMINED BY THE

EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION

XLIII VICTORIA.

1879
June 18.

IN RE AN APPLICATION OF THE WARWICK AND BIRMINGHAM CANAL NAVIGATION AND ANOTHER *v.* THE BIRMINGHAM CANAL NAVIGATIONS AND OTHERS.

EX PARTE THE LONDON AND NORTH WESTERN RAILWAY COMPANY AND THE BIRMINGHAM CANAL NAVIGATIONS.

Railway and Canal Traffic—Regulation of Railways Act, 1873 (36 & 37 *Vict.* c. 48), *s.* 11, 12—*Through Rate—Railway Commissioners' Jurisdiction to alter Tolls fixed by Statute—Absence of Party interested.*

Under an Act in 1846 the B. Canal Company were authorized to charge certain tolls, rates, and dues for goods traffic in respect of the canals and other works of the company, and were prohibited from making an order to reduce, advance, or otherwise vary all or any of such tolls, rates, or dues, without the consent of a railway company, who guaranteed that, if the income of the canal company in any year was insufficient to pay a dividend of 4*l.* per cent. on the capital of the canal company, the railway company would make up the deficiency.

The B. Canal Company was one link in a chain of canals owned by various companies and forming a continuous line of navigation between two points. In pursuance of an application made to them by one of those companies the Railway Commissioners, under the Regulation of Railways Act, 1873, s. 11, made an order allowing through rates for goods traffic between those two points, the effect of which would be to reduce the tolls of the B. Canal Company below the maximum allowed by the Act of 1846, and below the amounts theretofore charged by the company. The railway company were not represented before the Commissioners, and did not consent to the order or to any variation of the tolls:—

Held, that the order was made without jurisdiction, and must be restrained by prohibition;

By Kelly, C.B., because the Commissioners could not make an order affecting

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the liability of the railway company under their guarantee without at least hearing them;

By Pollock, B., and Hawkins, J., because the consent of the railway company had not been obtained, and the Regulation of Railways Act, 1873, gave the Commissioners no power without such consent to reduce the tolls, rates, or dues as authorized by the Act of 1846.

THE Company of Proprietors of the Warwick and Birmingham Canal Navigation and the Company of Proprietors of the Warwick and Napton Canal Navigation (hereinafter called the Warwick Canal Companies) having canals which form part of a continuous line of inland navigation between South Staffordshire and the river Severn on the one hand, and London and the river Thames on the other, gave notice in 1876 under the Regulation of Railways Act, 1873, s. 11, to the Company of Proprietors of the Birmingham Canal Navigations (hereinafter called the Birmingham Canal Company), and to each of the other canal companies which also formed part of the said line of navigation, of proposed through rates for the traffic of goods over the said line, stating both the amount and their apportionment and the routes by which the traffic was proposed to be forwarded. The Birmingham Canal Company and some of the other canal companies gave written notice of their objections, and appeared before the Railway Commissioners, and were heard by counsel in support of their objections.

The Warwick Canal Companies gave a written notice of their proposals to the London and North Western Railway Company, to which the solicitor for that company replied in writing, stating that the railway company had no control over the Birmingham Canal Company, and requesting the Warwick Canal Companies to withdraw their notice so far as the railway company was concerned. With this exception the railway company sent no answer to the notice, and did not appear before the commissioners by counsel or otherwise.

At the hearing before the commissioners the Birmingham Canal Company made various objections to the proposed rates, apportionments, and routes; inter alia, that the commissioners had no jurisdiction to make the order prayed for, on the ground that if allowed it would have the effect of reducing or varying

the tolls, rates, and dues payable and theretofore paid in respect of their canals and other works, and that the company were forbidden by statute to make any such reduction or variation without the consent of the London and North Western Railway Company, who had not consented. In support of this contention the Birmingham Canal Company relied upon the London and Birmingham Railway and Birmingham Canal Arrangement Act, 1846, 9 & 10 Vict. c. ccxliv.

By s. 5 of that Act it was enacted that without the previous consent of the London and Birmingham Railway Company (which is now merged in the London and North Western Railway Company) the canal company should not "make any order to reduce, advance, or otherwise vary all or any of the tolls, rates, or dues for the time being payable, or to become payable under the recited Acts, any or either of them, or otherwise howsoever upon or in respect of the canals and other works of the same company, or the use or enjoyment thereof respectively within the respective powers for those purposes which are or for the time being shall be subsisting, nor without the like consent enter into any arrangement or agreement with any person in respect of any such tolls, rates, or dues, or rescind or in any manner alter or vary any such arrangement or agreement which now is or for the time being shall be subsisting."

By s. 6 it was enacted that whenever the consent of the railway company was requisite such consent might be given by the directors for the time being of the railway company, and signified in writing either under the common seal of the company or under the hand of the chairman for the time being of the board of directors, or under the hands of any two of such directors.

By s. 15 it was enacted that if and so often as in any year the net amount of the tolls, rates, dues, rents, and other annual profits or income arising from the canals, works, property, and effects of the canal company should be insufficient to produce a dividend of 4*l.* per cent. upon the then capital, the London and Birmingham Railway Company should pay to the canal company such sum as would make up the deficiency.

The maximum tolls, rates, and dues to be taken by the canal company were specified in Schedule C.

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The Railway Commissioners considered that the railway company had by their conduct acquiesced in the application of the Warwick Canal Companies, but that their consent was not required to the order prayed for, and they made an order (20th of June, 1877) allowing the proposed through tolls, rates, and routes as being "a due and reasonable facility in the interest of the public," making, however, some alterations in the apportionments among the various companies.

Proceedings having been taken to get a case stated for the opinion of the Court and having failed, the Birmingham Canal Company, and also the London and North Western Railway Company, in February, 1878, obtained rules calling upon the Warwick Canal Companies to shew cause why a writ of prohibition should not issue, to restrain them and the Railway Commissioners from enforcing, or in any way proceeding to enforce the order of the 20th of June, 1877, or so much thereof as related to the Birmingham Canal Company or their rates, tolls, or dues.

After hearing counsel on the 27th and 28th of June, 1878, and on June 16, 17, and 18, 1879, upon various other points, the Court desired that the argument might be confined to the objection stated above upon the Act of 1846.

Wills, Q.C., *Pember, Q.C.*, and *R. E. Webster, Q.C.*, for the Warwick Canal Companies, shewed cause against the rule, and contended that since before 1873 no such things were known as compulsory through rates or routes, the Act of 1846, s. 5, above set out, could only refer to the local tolls or rates which the Birmingham Canal Company were authorized by that Act to take in respect of their own internal traffic; and that as by the Regulation of Railways Act, 1873, ss. 11 and 12 (1) the commissioners

(1) Sect. 11 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), enacts as follows: "Whereas by s. 2 of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company, and canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in

had power to compel a company to take less than the maximum rate which the company was entitled to charge, it was impossible to suppose that the legislature intended to give such a power where one company was entitled independently to charge tolls and rates, and yet to withhold the power where the consent of another company was required to any alteration in the tolls and rates; the very object of the Act of 1873 being to enable the commissioners to control the tolls and rates charged by companies, and to allow a through rate if they considered it "a due

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favour of any particular person or company or any particular description of traffic in any respect whatsoever, or shall subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company, and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal, or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other without any unreasonable delay and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways, or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf:

"And whereas it is expedient to explain and amend the said enactment: Be it therefore enacted that—

"Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company, and canal company, and railway and canal company at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates).

"Provided as follows:

"(1.) The company requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded:

"(2.) Each forwarding company shall within the prescribed period after the receipt of such notice, by written notice, inform the company requiring the traffic to be forwarded whether they agree to the rate and route, and if they object to either the grounds of the objection:

"(3.) If at the expiration of the prescribed period no such objection has been sent by any forwarding company the rate shall come into operation at such expiration:

"(4.) If an objection to the rate or

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and reasonable facility in the interest of the public." They also contended that the London and North Western Railway Company had had an opportunity of objecting, and that they must be taken to have waived their right or acquiesced in the application.

Sir J. Holker, A.G., C. Bowen, and *Potter,* for the commissioners, also shewed cause.

The rules were supported by *Matthews, Q.C., Sir H. James, Q.C.,* and *Jelf,* for the Warwick Canal Companies, and by

Pope, Q.C., W. G. Harrison, Q.C., and *R. S. Wright,* for the London and North Western Railway Company.

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route has been sent within the prescribed period, the matter shall be referred to the commissioners for their decision:

"(5) If an objection be made to the granting of the rate or to the route the commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly:

"(6.) If the objection be only to the apportionment of the rate the rate shall come into operation at the expiration of the prescribed period, but the decision of the commissioners as to its apportionment shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given:

"(7.) The commissioners in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof:

"(8.) It shall not be lawful for the commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route:

"(9.) The prescribed period mentioned in this section shall be ten days or such longer period as the commissioners may from time to time by general order prescribe.

"Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels and to the traffic carried thereby.

"Sect. 12. Subject to the provisions in the last preceding section contained, the commissioners shall have full power to decide that any proposed through rate is due and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly."

KELLY, C.B. The circumstances of this case are very peculiar and the case is of great importance and considerable difficulty. Here are several canal companies whose canals stretch from the Birmingham district to the Thames in London. The Warwick canal companies, thinking that it will be for their own advantage and also for the benefit of the public if a through route is established along those canals and a through rate for traffic ordered, apply to the Railway Commissioners for an order accordingly. There appear before the commissioners the Birmingham Canal Company and various other canal companies whose canals form part of the proposed route and which have an interest in the traffic, but the North Western Railway Company does not appear before them. In the course of the proceedings the Birmingham Canal Company, which opposed the through rates, made known to the commissioners that under their Act of 1846 the canal company had no power whatever to be parties to any measure which would have the effect of lowering their rates without the consent of the North Western Railway Company, and that the consent of the canal company or the withdrawal of objections by them was of no avail. The commissioners knew that from the arguments and statements made to them by the Birmingham Canal Company, just as well as we know it now, and that quite independently of the fact, to which Mr. Pope has last called our attention, that the Act of 1846 (9 & 10 Vict. c. ccxliv.) is by s. 30 made a public Act. The provisions of that Act were all detailed before the commissioners by those who represented the Birmingham Canal Company, and as soon as the commissioners found a state of things existing which altogether disqualified the canal company from giving any consent or withdrawing any objection to a proposal, which might have the effect of diminishing the canal tolls or rates without the consent of the North Western Railway Company, I think the commissioners were bound as a matter of law, in accordance with the practice of every court, to cause notice to be given to the North Western Company, who were as deeply interested in the question to be determined as any of the parties, to appear before them. Had they done so, the counsel for that company might have urged before the commissioners that which they have now urged before us, and which might have satisfied

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the commissioners that not only would it be unjust to make the order, but that they had no power to make it.

It may be that, so far as affects the public, and also as between the Warwick canal companies and the Birmingham Canal Company and the rest of the canal companies, it would be desirable and equitable to establish the proposed through rate. But to say that this order ought to stand to the prejudice of the North Western Company in the way I shall point out it would, and without hearing that company against the order, seems to me to be opposed to the first principles of the law and to justice.

Now what was the case? For a good consideration an arrangement sanctioned by parliament was made between the Birmingham Canal Company and the railway company, and in order to avoid what would be to the prejudice of the public, namely, constant disputes, litigation and expense between the two companies, the railway company guaranteed (by s. 15 of the Act of 1846) that if in any year the tolls, rates, and other profits of the canal company were insufficient to produce a dividend of 4*l.* per cent. upon the capital of the canal company, the railway company should pay so much as would make up the deficiency.

The canal company were anxious to secure this 4*l.* per cent. on their capital, and therefore agreed that no change should be made which might have the effect of diminishing the rates to be earned and received by them without the consent of the railway company, that consent to be signified in writing in a solemn form under the common seal of the company, or under the hand of the chairman or of any two of the directors. The order of the commissioners sets aside that agreement as completely as if it had never been made, or as if the railway company had in the prescribed form sanctioned the alteration. What power have the commissioners to break or set at naught an agreement for valuable consideration deliberately made between these companies? They have none—at least certainly not without having both companies before them and hearing by counsel or otherwise the railway company. If this order is carried into effect, and it happens to reduce the profits of the canal company so that they cannot pay 4*l.* per cent. on their capital, the railway company must so long as this order is in operation make up the deficiency. I do not say—because we are

not called upon to determine any such question—whether, if the railway company had appeared before them, the commissioners would or would not have have had jurisdiction to make this order on certain conditions. With full knowledge of all the circumstances and of the injurious consequences that may result to the railway company, they have made this order without their consent, without even hearing them.

It is said that something took place between the solicitors, or some officers of the railway company and the Warwick canal companies, as to a notice given by those companies to the railway company which the latter desired them to withdraw. I do not enter into that question at all because it does not arise in this case. It was not a notice emanating from the commissioners calling upon the railway company to appear before them ; it was not anything which would have authorized the railway company to go before the commissioners when the parties were all assembled and say they desired to be heard.

I think, therefore, that the order was against law and justice and made without jurisdiction and must be set aside.

POLLOCK, B. The order of the Railway Commissioners dealt with a continuous line of traffic carried by a series of canals from Birmingham and the surrounding district to the river Thames; and, so far as it was objected to by those who obtained the rules for a prohibition, dealt with one link in that chain of canals, viz., the Birmingham Canal Company. The commissioners find generally that the through rates asked for by the applicant companies, the Warwick and Birmingham Canal Company and the Warwick and Napton Canal Company, are "a due and reasonable facility in the interests of the public," and that the proposed routes are reasonable routes. We may dismiss all questions about reasonable routes, the only question for us being about rates.

Now I assume that the finding of the commissioners, that the through rate is a due and reasonable facility in the interests of the public, is a perfectly correct finding. That is not a matter on which we have to express any opinion. Our office is limited to seeing whether they have any jurisdiction to grant the through rate at all. It is said that they have no jurisdiction, because their

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order is in contravention of the Act of 1846, 9 & 10 Vict. c. ccxliv., which was the joint Act of the London and Birmingham Railway Company and the Birmingham Canal Company, and because the interests created or provided for by that Act were not represented before the commissioners. This is a most important question, and it is desirable to look at the history of the legislation and the mischief sought to be remedied.

Mr. Cardwell's Act of 1854, 17 & 18 Vict. c. 31, gave to the Court of Common Pleas for the first time a jurisdiction controlling the right of railway and canal companies as public carriers in many respects. It deals with two branches of carriage by railways and canals, first, with cases where a preference was given to one customer or one class of traffic over another; and, secondly, with a requirement of the public that every company having railways or canals which formed part of a continuous line of communication, or which had the terminus station or wharf of the one near the terminus station or wharf of the other, should afford all due and reasonable facilities for receiving and forwarding all the traffic. Under that Act I think any company, called upon to do something under either branch of those requirements, would have had a perfect answer if they had shewn that what they were called on to do was not "according to their respective powers." Those are the very words used at the beginning of s. 2 of that Act, and the whole of that section is recited in s. 11 of the Act of 1873, 36 & 37 Vict. c. 48. The Act of 1873 for the first time provides for through rates, but there is no power given to one person as a member of the public or as a customer of the company to apply to the commissioners to enforce upon a line of railway or canal through rates. A scheme for the jurisdiction of the commissioners is set out in the sub-sections of s. 11, under which all the power they have is to consider, when a proposal has been made by one company and rejected by another, whether that which is proposed, or (we may assume also) a reasonable modification of it, is a due and reasonable facility in the interests of the public. Sect. 12 gives the commissioners full power to deal with the through rate, in such a way as to require any forwarding company to receive something less than the maximum rate such company is entitled to charge.

Now, when you have a statute dealing with a particular subject-matter, and limiting the authority of the commissioners, and when that statute does not deal with other rights of third parties or with previous statutes regulating the rights of different railway and canal companies, that is a strong argument to shew that it was not the intention of the legislature to give the power asked for by those who have supported the order of the commissioners. I ground my decision upon the general language of the Act of 1873 throughout, shewing that there was no intention to create a system by which any member of the public might make a complaint and require the commissioners to call all the companies in question before them, and to deal with them generally, so as to do what may be substantial justice. In my opinion the commissioners had no such power, and if they dealt with this matter in that spirit they exceeded their jurisdiction.

The Act of 1846, passed on the joint application of the Birmingham Canal Company and the London and Birmingham Railway Company, regulated the tolls to be received by the canal company, and provided that those tolls should not be lessened, except with the solemn consent given in the mode prescribed by the railway company. The legislature must have had in view two objects. One was to carry out a fit and honest arrangement between those two companies for the sorting of the traffic, and for the guarantee by the railway company of any deficiency that might take take place in the dividend of the canal company by reason of the sorting; that is merely a private financial arrangement sanctioned by parliament. The other object was a public one, to deal with the two means of traffic between Birmingham and its surrounding district and London, railway and water, in the interests of the public; and the legislature provided, by s. 28 of the Act of 1846, that if at any time it should be found that what was beneficial to the two companies would run counter to the general interests of the public, then the Board of Trade might call upon the canal company to apply to parliament for a statute to amend that Act. That is a very strong power to give to a public board, and it shews that the Act of 1846 is not to be regarded merely as a private arrangement between the two companies.

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Now, is there anything in the Act of 1873 shewing an intention to disturb the Act of 1846, or any of the private Acts, of which that Act is a type, and the existence of which must have been thoroughly known to those who drew the Act of 1873? I can find no language shewing an intention to interfere with such an arrangement as was sanctioned by parliament in former years. I can hardly conceive anything more inequitable than that the commissioners should have power to make such an order as that made in the present case, and yet not have power to call before them and deal with the financial interests of that company which is so largely affected by the order. It might be said that the North Western Railway Company are in one sense the mortgagees of the tolls of the Birmingham Canal Company, and that if for the general welfare of those interested in the goods traffic of the country the mortgagor must give way, the mortgagee must give way too. But any tribunal which found it necessary, in the interests of the public at large, to lower the tolls of the canal company, and found also that such lowering was immaterial to that company because the dividend was guaranteed by the railway company, would, in accordance with the first principles of justice, desire to hear what the railway company had to say, and to consider whether it would not be proper also to release wholly or in part the railway company, who gave the guarantee, from the liability to which they were bound by the Act of 1846. There is a total omission of power to do any such thing, and I think that must not be forgotten in reading the Act of 1873.

I am not aware of any decision which throws light upon this question, unless it be the case of *Toomer* v. *London, Chatham, and Dover Ry. Co.* (1), where it was held that the commissioners had exceeded their jurisdiction in ordering a company to do some act which they had no power to do except with the consent of another company. The difficulty in carrying out the order in that case was to a great extent of a physical character, but the objection to the order was in principle much the same as in the present case.

Upon these grounds I think the present order is in excess of the commissioners' jurisdiction, and as the through rate they have

(1) 2 Ex. D. 450.

sanctioned is an entire matter and was so dealt with by them, we cannot strike out so much as relates to the Birmingham Canal Company and leave the rest remaining. The order therefore being bad in part is bad in its entirety, and this rule must be made absolute.

HAWKINS, J. I am of the same opinion. The effect of the commissioners' order is to vary the tolls upon the canals which form part of the system of the Birmingham Canal Company, and the objection to the order is that that company have no power of their own to alter these tolls, and that that can only be done, if at all, by the consent of the North Western Railway Company. The North Western Company were not parties to the proceedings before the commissioners, and it does not appear that they were enjoined to do anything by the order. It is conceded that by the Act of 1846 the canal company were forbidden without the consent of the railway company to reduce, advance, or otherwise vary, all or any of the tolls, rates, or dues payable in respect of the canals or other works of the company, and that that consent has never been obtained.

Now the Act of 1873 supplied a deficiency in the Act of 1854 with respect to granting through rates or tolls, and I think the language of s. 11, sub-ss. 1, 2, and 3 of the Act of 1873 is of vital importance in considering the present question. Sub-s. 1 provides that the company requiring the traffic to be forwarded shall give written notice to the forwarding company of the proposed through rate and the route. Here the Warwick and Birmingham and the Warwick and Napton Canal Companies did give the proper notice to the Birmingham Canal Company, though it does not appear whether they made the North Western Railway Company parties to the requirement or not. Then by sub-s. 2 the forwarding company (in this case the Birmingham Canal Company) is within the prescribed period by written notice to inform the requiring company whether they agree to the rate and route, and if they object to either, the grounds of the objection. It seems to me that this sub-section points expressly to the case in which the party required to do an act has the power to do it. If he objects he is to state the ground of the objection. A

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Hawkins, J.

more solid objection to a requirement that a party shall agree to something could not be made than this—I cannot agree to it because I have not the power. That seems to me a most reasonable and a conclusive objection.

Then by subs. 3: "If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration." So that if the Birmingham Canal Company, after receiving the statutory notice, instead of sending in their objection had simply remained silent and said nothing, the through rate would have come into operation at the expiration of the prescribed period without any order of the commissioners. So that, although the Birmingham Canal Company had admittedly no power to alter their tolls, they might virtually alter them by remaining silent for the prescribed period after receiving the notice of the Warwick Canal Companies.

Then sub-s. 5 provides that if an objection is made the commissioners shall consider whether the granting of the rate "is a due and reasonable facility." In construing that I think one must refer back to the language of s. 2 of the Act of 1854, which says that the companies shall "according to their respective powers" afford all reasonable facilities.

The short ground therefore of my judgment is that the commissioners have ordered the Birmingham Canal Company to do something which that company had no power to do, and had no power to agree to do without the consent of the North Western Railway Company.

Rule absolute, with costs against the Warwick Canal Companies.

Solicitors for Warwick Canal Companies: *Taylor, Hoare, & Taylor, for R. C. Heath, Birmingham.*

Solicitors for Railway Commissioners: *Hare & Fell, for Solicitor to the Treasury.*

Solicitors for Birmingham Canal Navigations: *Tucker & Lake, for Wragge, Evans, & Co., Birmingham.*

Solicitor for London and North Western Railway Company: *R. F. Roberts.*

MYERS *v.* DEFRIES AND OTHERS. (No. 2.) 1879 Dec. 15.

Practice—Costs—Event—Several Causes of Action—Rule 62 *of Rules of Hilary Term*, 1853—*Judicature Act*, 1875, *s.* 33—*Order LV., rule* 1.

When in the same action the plaintiff obtains a verdict and judgment as to one cause of action, and the defendant obtains a verdict and judgment as to other and distinct causes of action, the word "event" in Order LV., rule 1, is to be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or the Court.

Rule 62 of Rules of Hilary Term, 1853, is repealed by s. 33 of the Judicature Act, 1875.

MOTION by the plaintiff to review the master's taxation referred to the Court by Field, J., at chambers. The facts and arguments are set out in the judgment.

Nov. 20, 1879. *Murphy, Q.C.*, and *Clay*, for the plaintiff.

Gates, Q.C., and *Gore* (*Edward Pollock*, with them), for the defendants.

The following cases were cited: *Harris* v. *Petherick* (1); *Ex parte Mercers' Co.* (2); *Saner* v. *Bilton* (3); *Staples* v. *Young* (4); *Blake* v. *Appleyard.* (5)

Cur. adv. vult.

Dec. 15. The judgment of the Court (Pollock and Huddleston, BB.) was read by

POLLOCK, B. The plaintiff, by his statement of claim, sought to recover from the defendants, Coleman Defries and Moss Defries, damages in respect of three distinct causes of action: 1, for malicious proceedings in bankruptcy; 2, for libel and slander; 3, for trespass and conspiracy. The action was first tried in July, 1877, when a verdict was found on all the issues for the plaintiff against the defendants Moss Defries and Coleman Defries. A new trial having been ordered, the action was again tried in May, 1878.

The jury on the second trial found a verdict for the plaintiff

(1) 4 Q. B. D. 611.
(2) 10 Ch. D. 481.
(3) 11 Ch. D. 416.
(4) 2 Ex. D. 324.
(5) 3 Ex. D. 195.

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upon the claim for damages for libel with one farthing damages, and for the defendants upon the other issues. The learned judge directed the verdict and judgment to be entered for the plaintiff for a farthing damages upon the claim for damages for libel, and verdict and judgment for the defendants upon the other issues without making any order as to costs, and the associate gave his certificate accordingly. The plaintiff on the 8th of June, 1878, signed judgment in accordance with the certificate. In August, 1878, the solicitors for the defendants Coleman Defries and Moss Defries served notice of motion to the Court to deprive the plaintiff of his costs, and to direct the plaintiff to pay the defendants their costs of the action.

On the 17th of March, 1879, this Court made an order as follows: "It is ordered that the plaintiff have no costs of the action herein, and that there be no costs of this motion on either side," and this order was subsequently affirmed by the Court of Appeal.

The master upon the taxation refused to tax the costs of the issue found for the plaintiff, and taxed the costs of the defendants Moss Defries and Coleman Defries of the issues found for them; and upon this the plaintiff moved to review the taxation upon the ground that, there having been no order by the judge who tried the cause, or by the Court, giving to the defendants any costs they were not entitled to them.

Before the Judicature Act, 1873, this matter would have been governed by rule 62 of the Rules of Hilary Term, 1853, made under the Common Law Procedure Act, 1852, which provided that "when issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment."

It was argued, however, for the plaintiff, that this rule was repealed either expressly or by implication by the Judicature Acts, 1873 and 1875, and the rules made under the latter, and we think this is so. In the first place, by Order XIX., rules 1 and 2, a new method of pleading by statement of claim and statement of defence is substituted for the old pleadings by declaration and plea, and therefore the issues dealt with by the rule of 1853 cannot now be properly said to exist; and, secondly, by

Order LV., rule 1, a new rule is laid down as to costs, which is applicable to all proceedings in the High Court, and governs therefore costs in both the Chancery and Common Law Divisions, and this provides "that where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried, or the Court shall otherwise order."

The provisions of this rule must be taken in conjunction with s. 33 of the Judicature Act, 1875, which repeals any enactment "inconsistent with this Act or the principal Act;" and although the provisions of the Common Law Procedure Act, and of Order LV., rule 1, are not in all respects inconsistent, they are so if taken in their entirety since one makes costs follow the event, while the other makes them follow the event unless the judge or the Court otherwise orders; and therefore it seems to us that, applying the well known rules as to the repeal of an earlier by a later statute, which were so recently explained and acted upon by the House of Lords in *Garnett* v. *Bradley* (1) when this very rule was under consideration, it must be taken that the rule of 1853 is abrogated, and our judgment must depend upon what is the true construction of Order LV., rule 1.

But although this be conceded, it does not follow that, when we come to consider what is the true meaning and effect of Order LV., rule 1, we ought not to bear in mind what has been the general tendency of legislation and rules affecting the question of costs, where a plaintiff succeeds as to one portion of a claim and the defendant as to another, from the statute of James I. to the Judicature Acts; namely, that the costs followed the event, and that the successful party had them as of right. Remembering then these provisions as laid down and acted upon for a long series of years, what is the intention of this rule to be gathered from its language? We think it is that where by the statement of claim and statement of defence, or any further pleadings, more than one definite issue is raised and determined by the judge and jury by whom the action is tried, and no order otherwise is given by the judge, the word "event" is to be construed distributively, and if in the same action the plaintiff obtains a verdict and judgment as

(1) 3 App. Cas. 944.

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to one distinct cause of action, and the defendant obtains a verdict and judgment as to another cause of action, these are two events, and the master is to tax the costs accordingly.

It may be that in some cases where there are different findings of a jury in the same action there is but one judgment, and so but one event, for—as was pointed out by Bramwell, L.J., when this case was before the Court of Appeal (1)—the word "event" cannot mean the verdict of the jury without judgment; and, again, there may be cases in which there may be a finding of the jury, and even a judgment, upon some subordinate question raised by the pleadings which could not properly be said to amount to an event, and in which a master, in the absence of some direction by the judge who tried the cause, could only tax generally for the plaintiff or for the defendant; but here no such difficulty arises. The plaintiff claims in respect of three distinct causes of action, as to one of which he succeeds, and as to two of which the defendants succeed, and hence there are three findings of the jury and three judgments; and we are unable to see why the defendants, who have expended costs in defeating the two causes of action in respect of which they have succeeded, may not say that the two events were in their favour as correctly as the plaintiff can say that one event was in his favour; and we think we ought not the less to give this construction to the rule because we may foresee cases in which questions raised at a trial may be so subordinate to the real event of the action or so indefinite that a master might properly say, although there have been many issues there has been but one event. The answer to this sort of objection is that in such cases a direction must be obtained at the trial from the judge who tries the same, as is so frequently done in the Chancery Division.

The plaintiff further argued that failing in his first contention, this Court intended the order of the 17th of March, 1879, to be a final order upon the question of costs, and that the defendants, Coleman Defries and Moss Defries, not having obtained an order in the terms of the notice of motion for payment of their costs by the plaintiff, they are precluded from claiming of the plaintiff any costs either of the action or of any of the issues in the action.

(1) 4 Ex. D. 180.

This argument ought not, we think, to prevail. It seems to us clear that the costs which were the subject-matter of the defendants' notice of motion, and which were dealt with by the order of the Court of the 17th of March, were the general costs in the action; and that the Court, when making that order, had not before them the costs of the two issues upon which the defendants succeeded, and therefore had no intention to deprive the defendants of them.

The result is that there will be no order, and that the plaintiff must pay the costs of this motion and the costs at chambers.

Motion refused.

Solicitor for plaintiff: *Brandon.*

Solicitor for defendants: *J. Hands.*

THE OVERSEERS OF THE POOR OF THE PARISH OF SAINT WERBURGH, IN THE BOROUGH OF DERBY, APPELLANTS; HUTCHINSON, RESPONDENT. *Nov.* 29.

Poor Rate—Outgoing Occupier—Liability when no Incoming Occupier—Poor Rate Assessment Act, 1869 (32 & 33 *Vict. c.* 41), *s.* 16.

The statute 32 & 33 Vict. c. 41, s. 16, does not relieve an occupier, who is assessed in a poor rate but ceases to occupy before the rate has been wholly discharged, from his liability to pay the whole rate, unless there is some tenant who succeeds to the occupation of the hereditament, so as to become liable to pay a proportionate part of the rate.

1. UPON the hearing of an information preferred by the appellants against the respondent under s. 16 of the Act 32 & 33 Vict. c. 41, for refusing to pay a poor rate, the justices dismissed the information subject to a case.

2. By s. 16 of 32 & 33 Vict. c. 41, it is enacted that, "If the occupier, assessed in the rate when made, shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament, being unoccupied at the time of the making of the rate, become occupied during the period for which the rate is made, the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation as the case may be, and the date when such occupation commences, so far as

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the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseer, and shall be liable to pay so much of the rate as shall be proportioned to the time between the commencement of his occupation and the expiration of the period for which the rate was made in like manner and with the like remedy of appeal, as if he had been rated when the rate was made, and an outgoing occupier shall remain liable in the like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made, and the 12th section of the statute 17 Geo. 2, c. 38, shall be repealed."

3. The following facts were either proved or admitted. The respondent was the occupier of certain premises in the parish of Saint Werburgh, and duly assessed in a poor rate made on the 30th of April, 1879, for the half-year ending the 29th of September, 1879. The rate was demanded of him by the overseers of the poor, and it was stated by the respondent, and not denied by the appellants, that he was then about to give up possession of the premises to his landlord, who intended to pull them down, and to rebuild on the site. The respondent remained in possession of the premises until the 7th of August last, when he quitted the same without having paid the amount of rate at which he was assessed, and which had been demanded from him.

No new tenant would succeed or come into occupation of the premises so occupied by the respondent until they should be rebuilt, which would not be until long after the 29th of September, 1879.

4. It was contended on the part of the appellants that as there was no incoming tenant who would pay the balance of the rate, the respondent was liable for the whole amount, particularly as the amount was due from him immediately after seven days from the making of the rate.

5. On the part of the respondent it was contended that as an outgoing occupier he was liable only for so much and no more of the rate as was proportionate to the time of his occupation within the period for which the rate was made, that is, from the 30th of April, 1879, to the 7th of August following.

6. The justices decided in favour of the respondent. The question for the opinion of the Court was, whether the respondent was liable to pay the whole of the rate, or only so much thereof as was proportionate to the time of his occupation.

A. Glen (*E. R. Moon*, with him), for the appellants. Sect. 16 of 32 & 33 Vict. c. 41, was intended to protect the parish, and not to relieve the outgoing occupier. The latter part of it, as to the liability of the outgoing occupier, is to be interpreted by what appears to be the intention of the Act, and is limited to cases where there is a change of tenancy, and an incoming occupier to whom the overseers may look. In repealing the 12th section of 17 Geo. 2, c. 38, it was only intended to remove the double remedy of the overseers, and not to affect the liability of the outgoing occupier when there is no one to whom such liability may be transferred. This rate was due a week after it was made, and if demanded and not paid might have been distrained for. [He referred to *Edwards* v. *Rusholme*. (1)]

Morley, for the respondent. The liability of the outgoing occupier, mentioned in the last part of the section, must apply to the words at the beginning of it, referring to any occupier who ceases to occupy before the rate is wholly discharged. The proper inference from the words of the section is that the new Act was intended to remove the hardship under 17 Geo. 2, c. 38, s. 12 of the outgoing occupier being obliged, if called upon, to pay the whole rate.

A. Glen was not heard in reply.

KELLY, C.B. It is clear this section contemplates that where there is an occupation for one month by the old tenant and two months more by the new tenants, the former should pay only for one month and the latter for two. How this is to be carried into effect if the parish think fit (perhaps not knowing whether there is to be a new tenant, or thinking that if there be one it is not their business to look after him) to call, under the statute of Elizabeth, for the payment of the whole rate from the outgoing tenant just before he goes out and he pays it, seems a difficult

(1) Law Rep. 4 Q. B. 554.

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question to answer. There is no provision for this that I can see, and it seems very unjust that in such case the occupier for two months should not be liable to pay anything. I do not know whether the answer may be that the outgoing occupier may not be entitled to call for contribution on what may be called the equity of the statute, but that is not the case here, and nothing has happened to release the outgoing tenant from his liability to pay the whole rate. I see there is a provision in the Act that a rate may be paid by instalments, so that in some cases the burden of the rate may be more equally distributed between the two occupiers; but when a rate is made, as this seems to have been, not payable by instalments, there is nothing to prevent the parish recovering the whole of it at once whether or not a new tenant comes in afterwards. In this case, à fortiori, there is nothing to prevent their recovering the whole rate, because nothing has occurred to release the tenant from liability to the whole rate. I think, therefore, our judgment must be for the appellants.

STEPHEN, J. I think that the clause of this statute is not very neatly drawn. It looks as if there might have been some amendment made in it when it was being passed which to some extent altered the language. On the whole, the best construction I can put on it is that it means that, if there is a change of tenancy during the currency of the rate, then the two occupiers are to pay rateably. The outgoing occupier for the time which he has occupied, and the incomer for the time during which he has occupied, but if there is no incomer, but a vacancy, the statute left the matter as it was, and the liability of the outgoing tenant is not affected. Upon the whole, therefore, I think the decision of the magistrates must be reversed.

Judgment for the appellants.

Solicitor: *E. Warriner, for W. B. Hextall, Derby.*

WEBB *v.* EAST. 1879 *Dec.* 12.

Practice—Production and Inspection of Documents—Tendency to Criminate—Objection on Oath.

A party to an action who objects to the production of a document for inspection, on the ground that it may tend to criminate him, must make the objection on oath.

THIS was an action of libel in which the plaintiff, who had been in the service of the defendant as steward of his estates, alleged that the defendant had written letters which were libellous to a person by whom the plaintiff had been engaged, in consequence of which the plaintiff had been dismissed. The statement of defence alleged that the letters were confidential and privileged communications written by the defendant in answer to inquiries as to the character of the plaintiff.

Interrogatories were administered by the plaintiff among which was one asking whether any copies of any such letters were in the custody or possession of the defendant, and in reply thereto the defendant admitted that he had written three letters, and that copies were in his possession of three letters, of which the dates were given. The plaintiff applied at chambers to a master for an order that he should be at liberty to inspect and take copies of such letters which was refused. On appeal to a judge at chambers the matter was referred to the Court.

Bompas, Q.C., and *P. H. Smith*, for the plaintiff. If the defendant objects to produce these documents on the ground that they may tend to criminate him, he must make that objection on oath. The cases of *Hill* v. *Campbell* (1), and *Atherley* v. *Harvey* (2), so far as they are opposed to this view, are overruled by *Fisher* v. *Owen* (3), and *Allhusen* v. *Labouchere*. (4)

R. E. Turner, for the defendant. It appears upon the face of the proceedings that these letters, if produced, would tend to criminate the defendant, and he is not bound to state that upon

(1) Law Rep. 10 C. P. 222.
(2) 2 Q. B. D. 524.
(3) 8 Ch. D. 645.
(4) 3 Q. B. D. 654.

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oath: *Hill* v. *Campbell.* (1) The former practice of Chancery is now applicable.

[STEPHEN, J., referred to *Boyle* v. *Wiseman.* (2)]

Admitting that the defendant might be called as a witness by the plaintiff, and obliged to state on oath his objection to produce these documents, this is an interlocutory proceeding to which no such rule applies.

Bompas, Q.C., in reply.

KELLY, C.B. I am clearly of opinion that there is no distinction between preliminary proceedings and those before a judge and jury, as to the position of a party to an action who objects either to the production of a document or to any other mode of obtaining evidence, directly or indirectly, on the ground that the evidence may tend to criminate him. In every such case the objection must be taken by the party himself, and supported by his oath.

STEPHEN, J., concurred.

Order for inspection.

Solicitors for plaintiff: *Parkers.*

Solicitors for defendant: *Williams, James, & Wason.*

Nov. 13.

[IN THE COURT OF APPEAL.]

WOODGATE *v.* GODFREY.

Bill of Sale—Inventory of Goods with Receipt attached—Receipt of Sheriff's Officer for Purchase-Money of Goods sold under Execution—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.

A receipt containing an inventory and given by a sheriff's officer for the price of goods sold under an execution, is not an "assurance" within the Bills of Sale Act, 1854, and does not require registration under that statute, even although the purchaser from the sheriff allows the execution debtor to remain in possession of the goods.

Ex parte Cooper, In re Baum (10 Ch. D. 313) commented on.

RULE nisi for a new trial returnable before the Court of Appeal. The facts of the case are fully set out in the report of the

(1) Law Rep. 10 C. P. 222. (2) 10 Ex. 647.

proceedings before the Exchequer Division (1), but they may be shortly stated as follows: The goods of C. D. Watson had been seized in execution, and the plaintiff had bought them for 589*l.* 17*s.* The sheriff's officer gave a receipt which mentioned the consideration for the payment by the plaintiff, and which also contained an inventory of the goods. This receipt was never registered under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), and Watson remained in possession of the goods. The defendant was a subsequent execution-creditor against Watson, and an interpleader issue having been granted, the question between the parties was whether the receipt and inventory required registration under the statute already mentioned. Pollock, B., at the trial directed the jury that the receipt and inventory did not constitute a bill of sale; and the Exchequer Division (Cockburn, C.J., and Pollock, B.) refused to grant a rule for a new trial. (1) The present rule had been obtained by way of appeal from that decision.

Nov. 12, 13. *Macrae*, shewed cause. The receipt and the inventory do not constitute an "assurance" within the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). The defendant's counsel may rely upon *Ex parte Odell, In re Walden* (2) and *Ex parte Cooper, In re Baum* (3), but the former was a case of mortgage, and in the latter the insolvent himself had signed the receipt.

[BRETT, L.J. When the order nisi in this case was moved, Thesiger, L.J., was present, and he stated that in *Ex parte Cooper* (3) the Court considered that there was but one transaction, and that without the receipt and inventory there would have been no sale.]

In the present case the receipt was merely evidence of the price, and the inventory merely identified the subject-matter of the sale. The transaction would have been valid, if the receipt and inventory had not existed.

Percy Gye, in support of the rule. This case is concluded by *Ex parte Odell* (2) and *Ex parte Cooper*. (3) The Court cannot discharge this rule without overruling those decisions.

(1) 4 Ex. D. 59. (2) 10 Ch. D. 76.
(3) 10 Ch. D. 313.

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JESSEL, M.R. The difficulty in this case is occasioned by the decision in *Ex parte Cooper, In re Baum* (1); it is not easy to discover the principle upon which the judgment proceeded; but we have had the benefit of some remarks made by Thesiger, L.J., as to that case, and those remarks shew that the decision may be explained upon an intelligible principle. That principle is, that independently of the document there was no sale of the goods, that there was one transaction constituted by the inventory and the receipt thereto attached, and that if there had been no document there would have been no transaction. Accordingly, the Lords Justices held that the document was an "assurance" within the Bills of Sale Act, 1854, and required registration. But we have now to deal with a case where the facts are of a different nature. The goods were sold by the sheriff in the performance of his duty; the receipt is merely evidence of payment, and the inventory merely identifies the subject-matter of the sale. Under a writ of fi. fa. a sheriff may sell without any bill of sale, and upon payment of the price the transaction will be complete, and the property in the chattels sold will vest in the buyer without any writing. Suppose that an auctioneer sells a large quantity of goods in lots, and gives a separate receipt for each lot: surely the receipts cannot be "assurances," at least within the meaning of the Bills of Sale Act, 1854. Suppose that upon the 1st of January goods are sold and the price is paid, but that the buyer does not take possession of them, and suppose that upon the 1st of July a bill of sale of the same goods is executed between the same parties: the omission to register the bill of sale will not affect the transaction and annul the sale of the goods, which has taken place six months before. I think that the decision of the Exchequer Division must be affirmed.

BRAMWELL, L.J. I am of the same opinion. The reasoning of the Lords Justices in *Ex parte Cooper, In re Baum* (1) would go to shew that a mere receipt for the price of goods is an "assurance," and therefore a bill of sale within the meaning of the Bills of Sale Act, 1854. The legislature has thought fit to declare what the law shall be in future, and by the Bills of Sale

(1) 10 Ch. D. 313.

Act, 1878 (41 & 42 Vict. c. 31), s. 4, it is enacted that the expression "bills of sale" shall include amongst other documents "inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods." Under the new statute a question may arise whether its provisions can extend to a mere receipt for a sum of money which does not mention the consideration for the payment, but which is in truth an acknowledgment for the price of goods sold and left in the possession of the vendor. It is unnecessary to express any opinion upon this point now, but I wish to say that this remark has occurred to me as to the case before us: suppose the receipt had no stamp, and so was not admissible in evidence: might not the plaintiff say and prove, "I bought and paid for those goods." Strictly speaking, the receipt is not evidence at all; it is a mere declaration by the vendor that he has been paid, and, like other declarations, not admissible. The fact must be proved. I have only to add that I entirely agree with the judgment of Cockburn, C.J., pronounced in the Exchequer Division when this case was before it.

BRETT, L.J. This case is not concluded by *Ex parte Cooper, In re Baum.* (1) It was merely decided in that case that the receipt and the inventory were under the circumstances a bill of sale. The ground of the decision was that the sale of goods, the drawing up of the inventory, and the signing of the receipt formed but one transaction. That was the view of Thesiger, L.J., when this rule was moved, and it explains the decision. Therefore we are not bound in the present case by *Ex parte Cooper, In re Baum* (1); and it seems to me that, upon the sale by the sheriff and payment of the price, the property in the goods passed and the transfer was complete before the receipt and the inventory were signed. I am of opinion that the receipt and the inventory did not constitute an "assurance" within the meaning of the Bills of Sale Act, 1854.

Rule discharged.

Solicitors for plaintiff: *Walker & Mewburn Walker.*
Solicitor for defendant: *J. W. Heritage.*

(1) 10 Ch. D. 313.

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Dec. 2.

[IN THE COURT OF APPEAL.]

LAX AND BAINBRIDGE *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF DARLINGTON.

Negligence—Owner of Land receiving Payment for use of Land.

The defendants were the owners of a cattle-market, and in the market-place they had erected a statue, round which they had placed a railing as a fence. The plaintiffs attended the market with their cattle, and occupied a particular site, for which they paid a toll. A cow belonging to them, in attempting to jump the railing, injured herself, and subsequently died from the injuries. The jury found that the railing was dangerous:—

Held, that the defendants having received toll from the plaintiffs, and invited them to come to the market with their cattle, a duty was imposed on them to keep the market in a safe condition, and therefore an action would lie against the defendants for the loss sustained by the plaintiffs.

ACTION to recover damages for injuries to a cow which resulted in her death.

The cause was tried at the summer assizes, 1878, holden at Durham, before Lush, J., when a verdict was found for the plaintiffs for 22*l.* 14*s.* 6*d.*, and the learned judge reserved the case for further consideration.

The facts sufficiently appear in the following judgment:—

Dec. 21, 1878. LUSH, J. This action is brought to recover compensation for the loss of a cow, which came to her death from an attempt to leap over a spiked fence put up by the defendants round a statue, which they had erected in the market-place of Darlington. The defendants are the owners of the market, which is held for the sale of cattle, and the plaintiff Bainbridge had for many years brought his cattle there for sale. The market is held in the public street. The plaintiff Bainbridge had regularly occupied with his cattle a given site, for which he paid toll, and the statue had been erected near to that site between two or three years before the accident happened. The only point contested at the trial was, whether the spiked railing was or was not of sufficient height from the ground. The top of the spike was 2 ft. 6 in. from the stone in which the bars were set, and this the jury found was insufficient, and the railing, being spiked, was

consequently dangerous to cattle having a propensity to leaping. It was not contended that the plaintiff Bainbridge was guilty of any negligence by not properly looking after or managing his herd. The point made at the trial, and which has since been argued, was, that the corporation was under no obligation to have the fence at such a height as that cattle could not or would not be tempted to leap it; that the plaintiff was a licensee who must take the market as he found it; that there was plenty of room for him to stand his cattle elsewhere (which for aught that appeared was a fact), and that, as the danger was not concealed but obvious and apparent, he placed the cattle there at his peril.

I am of opinion that neither of these objections is tenable. The franchise of a market, like that of a port, is granted for the benefit of the public, and every one has as good a right to frequent the market for selling and buying the marketable commodities as he has to traverse a public highway. The grantee of a market, especially when he takes a toll for his own benefit, does, I think, incur an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted. See the observations of Bayley, J., in *Prince* v. *Lewis.* (1) I see no reason why, if he erects in the place which he appropriates to the market any obstruction, which causes danger to the property or the persons of those who frequent the market for a lawful purpose, he should not be liable to an indictment as much as the person who places a dangerous obstruction in a public highway. Of course, when the danger is, as it was in this case, obvious and apparent, a person who heedlessly and without reasonable care to avoid it incurs damage cannot maintain any action, because he is the author of his own wrong; but he is not a contributor to his own wrong by going to the market. The owner, or the person who in legal phraseology is lord of the market, has no right to say to him, "You might have gone to some other market, and as you chose to come here with your cattle you elected to run the risk." Nor can the owner of a port excuse himself for erecting a dangerous obstruction to the navigation by saying to the shipowner, "You might have gone to some other port." The subject using a port or a market is not a mere licensee; he is

(1) 5 B. & C. at 371.

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exercising a right as one of the public for whose benefit the port or the market was erected, and is entitled to have a free and safe passage in the one case, and a safe standing-place in the other. I was impressed at the time with an argument urged by Mr. Herschell. Suppose, he said, that the market was situate on the bank of a river or lake, is the owner responsible for cattle brought there if they run into the water and drown themselves? If the specific spot were designated in the charter by which the market was granted, so tha. the grantee had no option to hold it elsewhere, I am inclined to think he would even in that case be bound to fence for the protection of cattle; but if no place was designated, and he voluntarily selected so dangerous a spot, I should say certainly he would. This case, however, does not require that question to be answered. The charge against the corporation is of misfeasance, not of nonfeasance. The erection which constituted the danger in this case was an artificial erection by them, by which they rendered a safe market an unsafe one; that was a wrongful act. Nor do I think it is competent to the defendants to object that the plaintiff Bainbridge chose to continue standing his cattle in the place which he had been accustomed to use long before the statue was erected. Every part of a market-place is open to buyers and sellers, subject to the reasonable control and regulation of the lord of the market; and the selection of the spot in question is as much the act of the corporation as of the plaintiffs, for they regularly charged and received toll for the use of that specific site. Besides, it is impossible to say that the damage would not have happened, if the herd of which the cow formed part had been stationed at some other part. But whether it would or not, is not in my judgment material. The defendants had done a wrongful act in placing the spiked railings in the cattle-market so low as to be dangerous to the cattle. This was the immediate cause of the injury, and they cannot say that the plaintiffs were guilty of negligence in using that part of the market which the defendants assigned to the plaintiffs, though it was in proximity to the danger, they not being guilty of any negligence which immediately conduced to the accident: see *Clayards* v. *Dethick* (1); *Thompson* v. *North*

(1) 12 Q. B. 439.

Eastern Ry. Co. (1) I therefore give judgment for the plaintiffs for the agreed amount, 22*l.* 14*s.* 6*d.* and costs.

The defendants appealed.

1879. June 24, 25. *Herschell, Q.C.*, and *Sheild*, for the defendants. The jury have found that a danger to cattle existed in the market place, but that danger was at least as obvious to the plaintiffs as to the defendants. The plaintiffs were aware of the risk they ran, and this case is not that of a man who invites another on to his premises on which there is a concealed danger, like that in the case of *Indermaur* v. *Dames.* (2) A warning was not necessary, which might have been required if the danger had not been apparent: *Winch* v. *Conservators of the Thames.* (3) The only duty incumbent on the defendants was not to deceive: *Gautret* v. *Egerton.* (4) They have been guilty of no breach of duty, and in considering whether they are liable, all the circumstances must be looked at. The plaintiff Bainbridge was a regular attendant of the market, and therefore was well able to judge whether it was advantageous to sell his cattle there. If the risk had been considerable, he might have sent them elsewhere.

Cave, Q.C., and *John Edge*, for the plaintiffs. It is important to see what the duty of the defendants towards the plaintiffs really was. The defendants were owners of land, and the obligation of the owner of land towards persons using it may be classed under four heads:—1. The owner may grant a bare licence for the use of his land; but this licence is always revocable. 2. The licensee may come upon the land for the benefit of both, as where the owner of goods goes to a railway station to assist to unload them; in that case the owner of the land is bound to keep it in a reasonably secure condition: *Holmes* v. *North Eastern Ry. Co.* (5) 3. A person may come upon land not as licensee but in exercise of a right which may arise either out of a contract, or independently of a contract, such as a private right of way: here the owner of the land must do nothing to interrupt the enjoyment of the right.

(1) 2 B. & S. 106; 31 L. J. (Q.B.) 194.

(2) Law Rep. 1 C. P. 274; affirmed, Law Rep. 2 C. P. 311.

(3) Law Rep. 7 C. P. 458; affirmed, Law Rep. 9 C. P. 378.

(4) Law Rep. 2 C. P. 371.

(5) Law Rep. 4 Ex. 254.

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4. The duty of the lord of a fair or market towards persons using the market. If any part of the market becomes dangerous, the lord may exclude the public from it, for he may remove it from one part of the limits of his grant to another: *Curwen* v. *Salkeld.* (1) He cannot, however, erect an obstruction in the market dangerous to those using it. He is bound to afford proper accommodation to those who frequent it: *Prince* v. *Lewis* (2); *Mosley* v. *Walker* (3); *Rex* v. *Starkey.* (4) It is not sufficient to exonerate the defendants that the plaintiffs knew of the danger: it was an act of commission, and not of mere omission, which made the particular place dangerous to the plaintiffs' cows.

Herschell, Q.C., in reply.

Cur. adv. vult.

1879. Dec. 2. The following judgments were delivered:—

BRETT, L.J. In this case the plaintiffs brought an action against the defendants, as owners of a market for the purposes of purchase and sale. The cause was tried before Lush, J., and a jury, and the only question left to the jury was whether a certain part of the market was dangerous, and upon that question they found their verdict for the plaintiffs. As I apprehend, the real meaning of such a finding is that that particular part of the market was dangerous for the purposes of the standing of cattle. The case was elaborately argued before Lush, J., and again before us, but in both instances the whole stress of the argument was upon the question, whether the defendants, as the owners of the market, were under any liability to those who brought their cattle there to have the market not in a dangerous state for the reception of cattle.

Upon that question I have no doubt whatever. The defendants are the owners of a market to be used for the reception of cattle. They no doubt have a franchise which gives them a monopoly, but as between them and those who bring cattle to the market, they are in the position of owners of land receiving the cattle of persons who bring cattle there, they taking for the reception of those cattle what is called a market toll.

(1) 3 East, 538.
(2) 5 B. & C. 363.
(3) 7 B. & C. 40.
(4) 7 Ad. & E. 95.

The toll of a cattle market consists of various items, although they are not distinguished; the toll is no doubt paid in one sum, but a part of the toll is a payment for the liberty of standing cattle, either in any part of the market or on a particular spot, and under those circumstances the question is wholly independent of the defendants having the franchise of the market; they are in a position of owners of land receiving cattle on their land for the purpose of affording, amongst other things, standing room for the cattle in consideration of a payment made to them, and I cannot doubt myself upon the most ordinary principles of law, that inasmuch as they receive payment for that standing, they are primâ facie under the liability of affording a place which is not dangerous for the purposes for which the payment is made. Therefore upon the main question—and the question which was really argued before Lush, J., and before this Court—I am of opinion that the defendants were under the liability—primâ facie, at all events—of affording a reasonably safe place for the standing of cattle. The finding of the jury is, that they did not do so; therefore, in my opinion, the defendants were liable, and our judgment upon that ground ought to be against them.

No other question was offered for the consideration of the jury, and it seems to me obvious that it was the purpose of both parties that no other question should be offered to them. If there had been evidence of any other question, and the parties had desired it, the learned judge would have left it to them. I do not doubt that although the defendants are primarily liable as I have stated, yet if the plaintiffs themselves were guilty of an unreasonable want of care in the mode in which they put their cattle into the place destined for them, or if the plaintiffs wilfully and purposely undertook a risk and danger which was fully known to them, under those circumstances, notwithstanding the primary liability of the defendants, it would be right in point of law to say the plaintiffs had contributed to the loss, or that they were the sole cause of the damage to their cow. But it seems to me that no such question could be raised against the plaintiffs, unless there was evidence to support it, and unless the parties desired that such a case should be left to the jury. In the absence of any such question being raised, I am of opinion that the defendants were

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liable, and that the judgment of the learned judge was right, and that judgment ought to be affirmed.

BRAMWELL, L.J. My Brother Brett has come to the conclusion that the plaintiffs are entitled to our judgment, and I agree with him. I should like to say why I agree. I am not influenced by the consideration of this being a market; it might have been a cattle show, or a place opened by the defendants as a speculation of their own. Market or no market, the ground upon which I proceed is that the defendants receive the plaintiffs' money; they take a toll from the plaintiffs and they make a profit, they invite the plaintiffs to come and make use of their market for profit to themselves. The defendants are therefore liable; as my Brother Brett has said, they are bound to have the place in a non-dangerous condition for those who come there for any lawful purpose on certain occasions. My opinion would have been the same, if the defendants had dug a trench in the market to lay down gas pipes, or if a gas company under some power had made a trench; it does not matter, in my judgment, whether the defendants did it or whether somebody else did it. If the place was not safe, if there was a danger that was not obvious to any person coming there, that person ought to have been warned against it, and it should have been said, "If you come, you must come and take the place as you find it, for the situation of things is such that there is danger there." The defendants did not warn the plaintiffs, and the jury have found that the place was dangerous, and therefore there is, in my opinion, a primâ facie case against them, not upon any ground of negligence or misfeasance, but simply upon this ground, that they have not done their duty to their customer in apprising him that there was danger in his accepting their invitation and allowing him to come to their ground for a profit to themselves. That is the ground on which, in my opinion, the plaintiffs are entitled to judgment.

It was argued before us that the plaintiffs incurred the loss through their own fault, and that they came into the market-place notwithstanding the danger was obvious, or that they knew of it. I think we were told that one of their cows had met with a similar accident on a former occasion, and that they chose to go

there with a knowledge of the danger. If that question had been before us, I should have had very great misgivings whether the plaintiffs were entitled to recover, because, if they knew the amount of the danger and chose to risk it, it is their own fault, they are volunteers; and in my opinion the defendants ought not to have been made liable to them in that case. I do not want to go into the matter at any length, but I think there is an important principle involved in it—a principle as to which there are continual mistakes made and great injustice done. We have an exemplification of it in the common case of a passenger by a railway. A person travelling on a railway is taken to some place where he ought not to have been taken—beyond a platform, for instance. He jumps out, risking the danger, and hurts himself. In my opinion, in such a case as that he ought to have no remedy against the company for the hurt; if he chooses to jump out and hurt himself, he must take the hurt. What he must do is to sit in the carriage and be carried on beyond where he wants to go, and then bring his action against the company for not affording him proper accommodation to get out. I have no doubt of the good sense of that; I have not a misgiving of it, and I cannot agree to a great deal of what was said in the case of *Clayards* v. *Dethick*. (1) It was there asked, "Was the cabman bound to stay in all day?" Bound! Bound to whom? A person being bound supposes his being bound to somebody. It is an inaccurate expression. One does not care about words, except when they mislead. The expression "bound" was used there. Why, of course, he was not bound, because there was nobody to say to him "you shall." But if he chooses to go out with an obvious danger before him, he must take the consequences. Suppose a man is shut up in the top room of a house unlawfully, is he bound to stay there? He is not bound to do anything of the kind; he may jump out if he likes to run the risk of breaking his neck or his limbs; he may let himself down by a rope or a ladder, but if he runs the risk of getting out and breaks his neck, the person who shuts him up is not guilty of manslaughter; and if he breaks his leg, he ought not to have any right of action against that person, although he was not bound to stay there. Then there was

(1) 12 Q. B. 439.

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another expression used, which I cannot help thinking was an unfortunate one. It was this: "What would a prudent man do?" Just see the consequence of that sort of reasoning. A prudent cabman with a good horse having a shilling fare offered to him would have stopped at home; a prudent cabman with a bad horse and a pound fare offered to him would have chanced it. The consequences would be that he could recover if he hurt a bad horse, but he could not recover if he hurt a good one. The truth is, to talk of what a prudent man would do is a misleading way of considering the matter. A prudent man would lead a forlorn hope under some circumstances, because the possible gain in his estimation would be equal to the risk. It is not, therefore, a question of prudence. I dare say a prudent man might jump out of a train going very fast, if he saw some imminent danger to his wife, or child, or anybody for whom he had great affection, and he could immediately go and rescue or help them. It is not, therefore, a question of prudence as far as he is concerned. I think that case —I should not have discussed it at the length I have done if an erroneous idea was not conveyed by it—can only be justified on a ground which I think will be found, especially in the judgment of Wightman, J., and upon which I am inclined to think some of the judges really decided it. It is this: that the danger there was not an obvious one; that when the cabman went out he got into trouble from what in truth was a pitfall, the nature of which he was unaware of, but which had been prepared for him by the defendant. Upon that ground, perhaps, the judgment may be supported; but I have a misgiving, even then, whether, when there was a danger of accident, it was not his—I will not say his duty—but whether it was not for him to ascertain the extent of it before he ran the risk of it. However, I think it is upon that ground only that that case can be sustained. It is said that it has been afterwards cited and adopted in *Wyatt* v. *Great Western Ry. Co.* (1) It was no doubt cited and adopted, but I am very much inclined to think it was adopted upon the principle that I have mentioned, and that may be seen especially from the judgment of the majority of the Court. If *Clayards* v. *Dethick* (2) and *Wyatt* v. *Great Western Ry. Co.* (1) are adopted

(1) 6 B. & S. 709; 34 L. J. (Q.B.) 204. (2) 12 Q. B. 439.

to their full extent, I am constrained to express my distrust of those cases. I am glad to think that this last question does not arise here. If the jury had found that the plaintiffs knew of the danger, or that it was obvious to them, I should have had very considerable misgiving as to whether they were entitled to judgment.

COTTON, L.J., concurred in the judgment of Brett, L.J.

Judgment affirmed.

Solicitors for plaintiffs: *Chester & Co., for T. Clayhills, Darlington.*

Solicitor for defendants: *A. Scott Lawson, for Hugh Dunn & Watson, Darlington.*

THE SINGER MANUFACTURING COMPANY *v.* CLARK.

Nov 29.

Pledge of Goods—Pawnbrokers Act, 1872, 35 & 36 *Vict. c.* 93, *s.* 25—*Rights of Owner of Goods pledged against his Will.*

The indemnity given by section 25 of the Pawnbrokers Act, 1872, to a pawnbroker who delivers a pledge to the person producing the pawn-ticket applies only as between the pawnbroker and the pawner or the owner who has authorized the pledge, and the Act does not affect the common law rights of the owner of property which is pledged against his will.

SPECIAL CASE on appeal from the Southwark County Court.

On the 16th of October, 1878, the plaintiffs, who carry on (inter alia) the business of letting out sewing machines on hiring agreements, let a machine No. 2,313,254, the admitted price of which at the time of hiring was 7*l.* 17*s.*, to one Elizabeth Smith, who on the same day signed an agreement in the form hereinafter set out, and took possession of the machine thereunder:—

"Agreement made the 16th day of October, 1878, between the Singer Manufacturing Company, of 39, Foster Lane, Cheapside, London, herein called the 'owners,' of the one part, and Elizabeth Smith, of 225, Mayall Road, Brixton, herein called the 'hirer,' of the other part.

"Whereby the owners agree to let to the hirer the sewing

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machine and accessories described by the indorsement hereon, and the hirer agrees:

"A. To pay the owners, on hiring the machine, the sum of—

"B. To pay the owners, on and after this date, a rent of 2*s.* 6*d.* per week, payable weekly, in advance.

"C. To keep the machine and accessories in good order and undefaced (damage by fire included), fair wear only excepted, and at all times to allow the owners' authorized agents to inspect the same.

"D. To keep the machine and accessories in the hirer's own custody at the above-mentioned address, and not to remove them without the owners' previous consent in writing.

"E. That if the hirer do not duly perform this agreement the owners may (without prejudice to their right to recover arrears of rent and damages for breach of this agreement) terminate the hiring and retake possession of the said machine and accessories, and for that purpose leave and license is hereby given to the owners to enter by force, if necessary, any premises occupied by the hirer or of which the hirer is tenant, to search for and retake possession of the said machine and accessories without being liable to any suit, action, indictment, or other proceeding by the hirer or any one claiming under him or her.

"F. That when the hiring is terminated, $\frac{\text{and}}{\text{or}}$ the machine and accessories are returned to the owners, the hirer shall not, on any ground whatever, be entitled to any allowance, credit, or return for payments previously made, and the sum paid on hiring shall not be set off against rent.

"The owners agree:

"A. That the hirer may terminate the hiring by delivering up to the owners the machine and accessories.

"B. That the hirer may at any time during the hire become the purchaser of the machine and accessories by payment in cash of the hereon indorsed price.

"C. That if such purchase be effected, credit will be given for all payments previously made under this agreement, and if the rent has been regularly paid a further credit of 5 per cent. will be allowed upon the payment on hiring, provided it amounted to 1*l.* or upwards. Unless a purchase be effected the hirer shall remain bailee only of the machine and accessories."

2. No payment was ever made under the hiring agreement by Elizabeth Smith, or by any person on her behalf, to the plaintiffs or to any of their agents, and it was admitted on the part of the defendant that at the time when the machine was pledged, as mentioned in the next paragraph, the bailment had been determined, and the plaintiffs were entitled to the possession of the machine.

3. On or about the 30th of November, 1878, the machine was pledged with the defendant in the name of Brown, for a loan under 40s., but whether by Elizabeth Smith, or by some other person with or without her consent, did not appear.

4. On the 9th of December, 1878, a clerk in the service of the plaintiffs saw the machine on the premises of the defendant, such premises being licensed premises wherein the defendant carries on the business of a pawnbroker under the provisions of the Pawnbrokers Act, 1872, and thereupon served him with a demand of possession on the part of the plaintiffs in the words following:—

"As agent for and on behalf of the Singer Manufacturing Company of 39, Foster Lane, Cheapside, in the city of London, sewing machine manufacturers, I hereby give you notice that the sewing machine numbered 2,313,254 in your possession is the property of the Singer Manufacturing Company, having been hired by Elizabeth Smith, of 225, Mayall Road, Brixton, under an agreement bearing date the 16th day of October, 1878. And I hereby demand that you forthwith deliver to bearer hereof, who is fully authorized to receive the same, the said sewing machine."

5. The defendant refused to deliver up the machine to the plaintiffs or their agent under the notice of demand on the ground that it was informal and invalid, as not being in compliance with the provisions of the Pawnbrokers Act, 1872.

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6. The plaintiffs took no further steps until they commenced the present action.

7. It was admitted that plaintiffs were not the holders of the pawn ticket relating to the pledge, and that when the notice of demand was served on the defendant the plaintiffs did not tender to him the amount of the loan, and the profit due upon the pledge.

8. On or about the 13th of January, 1879, the defendant delivered the pledge to a person producing the pawn ticket relating thereto on the payment of the loan and profit, but gave no notice to the plaintiffs or their agent of his having done so.

9. On the 17th of February, 1879, the plaintiffs became aware of the defendant having delivered the machine, as in the last paragraph mentioned, and on the 22nd of the same month they commenced this action against the defendant in trover, and for wrongful conversion of the sewing machine, and claimed 7*l.* 17*s.* as damages.

10. On the hearing the above stated facts were admitted.

11. It was contended on the part of the plaintiffs that their common law right, as owners, to demand possession of their own property, and to sue for damages for the wrongful conversion thereof by the defendant, was not affected by their not having availed themselves of the provisions of the Pawnbrokers Act, 1872, their title as true owners being paramount to that of the owner.

12. On the part of the defendant it was contended that a pawnbroker was not liable in trover at common law when the alleged act of conversion was, as in this case, an act done in conformity with the provisions of the Pawnbrokers Act, 1872, and when the plaintiffs, as owners, had not availed themselves of the provisions contained in s. 29 of the Act; that the machine having been pledged for a loan under 40*s.* the case was within the provisions of the Act, which by s. 10 are applied to every loan by a pawnbroker of 40*s.*, or under: that s. 29 provided a remedy for the true owner by a declaration in the form contained in the 4th schedule to the Act: that further in default of such prescribed form of declaration being delivered by the plaintiffs to the defendant, the defendant was bound to deliver back the machine, on

payment of the loan and profit, to any person producing the pawn-ticket relating thereto, and would by neglecting or refusing so to do have rendered himself liable to a penalty not exceeding 10*l.*, as having been guilty of an offence against the Act (s. 45).

13. It was further contended on the part of the defendant that having regard to the period limited to three days, within which a declaration shall be made as provided by s. 29 of the Act, the plaintiffs in standing by from the 9th of December, 1878, to the 17th of February, 1879, might be deemed to have foregone their right (if any) of priority over the holder of the ticket to require delivery of the machine with or without a tender of the loan and profit to the defendant.

The judge of the county court gave judgment for the defendant.

The questions for the opinion of the Court were:

First. Whether this action was maintainable by the plaintiffs, notwithstanding the provisions of the Pawnbrokers Act, 1872?

Second. Whether in the circumstances of this case, assuming the action to be maintainable, the plaintiffs were entitled to succeed?

Benjamin, Q.C. (*Lumley Smith,* and *Candy,* with him), was heard for the plaintiffs, and

J. Brown, Q.C., for the defendant.

Cur. adv. vult.

July 29, 1879. HAWKINS, J., delivered the judgment of the Court (Huddleston, B., and Hawkins, J.)

The question in this case is, whether the true owner of an article which has, without his knowledge or consent, been pledged with a pawnbroker for such a sum as will bring the contract of pledge within the operation of the Pawnbrokers Act, 1872, is entitled, in exercise of his common law right, to recover it or its value from the pawnbroker by action—notwithstanding the pawnbroker has returned it to the pawner who has redeemed it, or whether his common law right so to do has been taken away by the provisions of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93.)

The facts being all fully stated in the special case, it is unnecessary to repeat them.

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On the part of the defendant, the pawnbroker, it was contended that he having delivered up the pledge to the person who for the time being was the holder of, and produced the pawn ticket, was, by the 25th section of the Act, indemnified for so doing against all the world, including, of course, the true owner, and that the notice and demand served upon him whilst the pledge was yet in his custody, operated as nothing in the absence of such a declaration as is prescribed in s. 21, and the form of which is given (No. IV.) in the 3rd schedule to the Act.

It was not, and could not be denied, that at common law the plaintiffs would be entitled to recover. They were the owners of the article pledged, and entitled to the possession of it, for the bailment to Smith, the pawner, had been determined when it was pledged to the defendant: see *Cooper* v. *Willomatt* (1), where it was held that on a wrongful sale by a bailee to a bonâ fide vendee, the latter was liable in trover to the bailor. Here, instead of a wrongful sale, there was a wrongful pledge; but the same law applies, and the delivery back to the pawner after notice of the plaintiffs' title and demand was clearly a wrongful conversion, unless it was protected by the provisions of the 25th section: see *Peek* v. *Baxter* (2); *Packer* v. *Gillies* (3); *Hoare* v. *Parker.* (4)

In construing the provisions of the Pawnbrokers Act, 1872, some assistance will be derived from a clear understanding of the relations between the pawner and pawnee independently of all statutory enactment. In the case of an ordinary pledge there is no doubt an implied undertaking on the part of the pledgee to redeliver to the pledger the article pledged on payment by the latter of the sum advanced, with interest; but there is on the other hand an implied undertaking on the part of the pledger that the property pledged is his own, or that he has the authority of the owner to pledge it, and that it may be safely delivered back to him. The undertaking on the part of the pledgee to redeliver, however, is not an absolute one, but is subject to this—that the pledger has the title he warrants himself to have, and if it turns out that he is not the owner, and had no authority from

(1) 1 C. B. 672.
(2) 1 Stark, 472.
(3) 2 Camp. 336, n.
(4) 2 T. R. 376.

him to pledge, the pledgee may restore the property pledged to the person lawfully entitled to it: see *Cheesman* v. *Exall.* (1)

Further assistance to a correct understanding of the statute, and the intention of the legislature will be acquired by bearing in mind one or two matters of common knowledge relating to pledges and pawn tickets.

In the first place, it is a very common occurrence for a pawner to dispose by sale or gift of his pawn ticket to another person, with the intention to confer upon the vendee or donee a right to redeem the article pledged; and by the accidents of life it constantly happens that the pawner loses or accidently destroys his ticket, or has it stolen or fraudulently obtained from him. It is also a very common practice for the owners of articles upon which they desire to obtain loans to employ other persons to pledge such articles for them, in which case the person so employed, and who actually delivers the article to the pawnbroker, is in law the pawner, and in his name the ticket is made out, and it not rarely happens that this ticket is retained by the pawner and not delivered over to the employing owner. It was to meet such and similar contingencies (among other things) that the Pawnbrokers Act, 1872 (in substitution of the Acts which previously existed upon the subject) was passed—partly for the protection of pawnbrokers, partly also for the protection of pawners and owners of property pledged.

We come now to consider the provisions of the statute itself, in construing which it must be constantly borne in mind that it recognises a clear distinction between the pawner of goods and the owner for whom or by whose consent they are pawned. This is apparent on reading the 12th section, which makes it imperative upon the pawnbroker to keep such books as are described in the 3rd schedule—by reference to which it will be seen that in the pledge book (Form No. 1) the name and address of the pawner (who by s. 5 is defined as "a person delivering an article for pawn") and also the name and address of the owner, "if other than the pawner," are required to be inserted in separate columns. It is obvious that in using the word "owner" in the form in which the pledge book is to be kept, the legislature contemplate only

(1) 6 Ex. 341, per Pollock, C.B., and Parke, B.

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the owner assenting to or on whose behalf the pledge is made, for it would be absurd to suppose they would recognise the taking by a pawnbroker knowingly of a pledge without the owner's assent. By the 14th section a pawnbroker is required to give to the pawner a pawn ticket, and he is prohibited from taking a pledge in pawn unless the pawner takes the pawn ticket; and on reference to the form of ticket given in schedule 3 it will be seen that the name of the pawner is inserted and not that of the owner.

By s. 16 every pledge is redeemable within twelve months from the day of pawning; the Act does not say by whom the pledge is redeemable, but it is obvious that primâ facie the pawner who makes the pledge is the person to redeem it; for the contract, as we have pointed out, is between him and the pawnbroker.

We now come to the 25th section, upon which we think great light is thrown by the matters to which we have adverted. It enacts that "the holder for the time being of a pawn ticket shall be presumed to be the person entitled to redeem the pledge, and subject to the provisions of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn ticket, and he is hereby indemnified for so doing;" and it is followed immediately by s. 26, which enacts that "a pawnbroker shall not (except as in this Act provided) be bound to deliver back a pledge unless the pawn ticket for it is delivered to him."

It is clear to our minds that in these two sections the legislature intended only to provide for the delivery back of the article pledged to the person entitled to redeem, and as between the pawner and the pawnbroker to compel the latter to recognise, in the absence of grounds for belief to the contrary, the possessor of the ticket as the person so entitled, and to presume him to be the lawful holder of it without further investigation of his title; and, should it so happen that the ticket is presented and the pledge redeemed by a person who has in fact no title to the ticket, to protect and indemnify the pawnbroker against any claim by the real pawner, or anybody to whom he may have transferred his title, or the owner who has sanctioned the pledge. This construction seems to us to give full effect to, and to be the true interpretation of the 25th section. In our judgment that section

in no degree affects an owner whose property has been pledged against his will. He is in no sense a person entitled to redeem the pledge, or privy to the contract of pawn. His claim rests on a title paramount, which is unaffected by the dealing between the pawnbroker and his customer. The 25th section does not say that the holder of the ticket shall be presumed to be the owner, but that he shall be presumed to be the person entitled to redeem, or in other words, the person entitled to represent the pawner whose title is altogether inconsistent with that of an owner whose property has been unlawfully pledged against his will.

To our mind it is very clear that the legislature did not in the sections relating to the redemption of pledges intend prejudicially to affect the rights of such owners as we have last referred to, otherwise a valuable jewel pledged for a sum of 5*s.* or 10*s.* by a fraudulent person without title would if unredeemed within a year become under s. 17 the pawnbroker's absolute property. A state of things too monstrous to bear a moment's serious consideration.

In the course of the argument there was much discussion upon the 29th section of the Act. In that section we find nothing militating against the views we have expressed; that section was, as is stated in the preamble to it, intended for the protection of owners of articles pawned, and of pawners not having their pawn tickets to produce, that is to say, persons entitled to redeem but who for some reason or other are unable to produce their tickets, and it points out the machinery by which the protection is made available.

The first words of sub-s. 1 evidently contemplate the case of such an owner as the Act requires to be named in the pledge book to which we have referred, viz., an owner whose property has been pledged by his authority, and which therefore of course must be redeemed before the pawnbroker can be called upon to deliver it back. It is true the section does not in terms limit its operation to such owners, and we can well understand and appreciate the reason for this. It probably is that the legislature had it in view to enable an owner whose goods are pawned without his authority, if he thinks fit so to do, to put himself in the same position as an owner whose goods have been pawned by his consent, that is to

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say to abandon his legal right and adopt the pledge, and so give himself a title to redeem it, as many a person would doubtless gladly do where an article of value is pledged for a trifling sum, rather than incur the trouble and expense of insisting upon his paramount title. But if an owner avails himself of this privilege, which it is at his option to do, he must adopt the machinery provided for him. We do not deem it necessary further to discuss that section, in which not a syllable is to be found indicative of an intention to interfere with the common law right of owners of property unlawfully pledged. The 30th and 36th sections appear to us only to afford additional protection to such owners.

After much consideration we have arrived at the conclusion that the 25th section justifies the pawnbroker only to this extent, viz., in treating the holder of a pawn ticket as the person lawfully entitled to hold it, and that the indemnity given by that section is limited to and protects the pawnbroker only against the pawner, the owner who has authorized the pledge, and all those who claim title under them, and that none of the provisions of the statute were intended to affect nor do they affect the common law right of an owner of property pledged against his will who claims by title paramount to that of the pawner.

The appellants, the plaintiffs, are therefore entitled to our judgment.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *J. N. Mason.*
Solicitor for defendant: *C. Thorpe.*

BOLDERO AND ANOTHER *v.* THE LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY, LIMITED.

1879
Nov. 17.

Fraudulent Conveyance—13 *Eliz. c.* 5—*Delaying Creditors.*

Debtors in insolvent circumstances executed a deed by which they conveyed all their estate to trustees on trust to sell in such manner as they might think proper, and to divide the residue of the proceeds after paying expenses rateably among the creditors parties to the deed, and, if the trustees thought fit, creditors who refused or neglected to execute, and, if the trustees thought proper but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors. The deed provided for the payment of maintenance to the debtors if the trustees thought fit, and the executing creditors respectively indemnified the debtors and the trustees in respect of the bills of exchange and promissory notes made or indorsed to them respectively by the debtors in respect of the scheduled debts:—

Held, that the deed was not void under 13 Eliz. c. 5.

Spencer v. *Slater* (4 Q. B. D. 13) distinguished.

SPECIAL CASE stated in an interpleader issue between the plaintiffs, the trustees under a deed of assignment hereinafter mentioned, and the defendants, the execution creditors of the assignors.

The facts, so far as material to the points decided, were as follows:—

In July, 1877, Edward Boldero and William Percy Foster, who carried on business in partnership as printers, and are hereinafter called "the debtors," obtained from the defendants a loan of 50*l.* upon the security of a bill of sale of engines, boilers, and other machinery and effects of the debtors at their place of business, 1, Great Dover Street, Borough, and by way of further security the debtors and the plaintiff, Samuel Bleach, as surety for them gave their joint and several promissory note to secure the sum of 62*l.* 10*s.* The loan and interest were repayable by monthly instalments. The bill of sale was not registered.

On the 10th of July, 1878, a deed was made between the debtors of the first part, the plaintiffs, as trustees for the creditors of the debtors who might become parties thereto, of the second part, and the several persons being creditors whose names were thereunto subscribed of the third part.

The deed assigned all the debtors' estate and effects to the

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trustees upon trust to sell the same, and out of the moneys to be received to pay the rates and taxes, salary and wages of any clerk of the debtors, the costs and charges incurred previous to the execution of the assignment in relation to the effects or affairs of the debtors, and the costs and charges of the assignment, the composition on debts not exceeding 10*l.*, and "to make or pay to the debtors such allowance for their maintenance or otherwise as the trustees may think fit, and then to divide the balance of such moneys so to be received rateably among the creditors parties hereto in proportion to the sums set after their names, including as such creditors, if the trustees shall think fit but not otherwise, such persons as are creditors of the debtors who may have refused or neglected to execute these presents, and to pay the dividends on the debts due to such last-mentioned creditors who are not parties hereto to the debtors if the trustees think proper but not otherwise; and it is hereby declared that it shall be lawful for the trustees as they in their discretion may think proper to return to the debtors all or any part of their household furniture and effects, and to employ any person or persons in carrying out the trusts aforesaid and in carrying on the trade if thought expedient, and to pay to such person or persons in carrying out the trusts aforesaid and in carrying on the trade if thought expedient out of the said trust moneys any sum or sums of money." The deed contained also a declaration that the trustees should not be answerable the one for the other, nor for any loss or damage which may happen in or to the trust estate.

The deed contained the following covenant: "The said several creditors do hereby respectively covenant with the debtors, their executors and administrators, that they the said creditors respectively will indemnify the debtors, their executors and administrators, and the said trustees, their executors, administrators and assigns, from and against the several bills of exchange and promissory notes which have been accepted, made or indorsed and delivered to them respectively by the debtors, for or in respect of the said debts or sums set after their names respectively, and from all costs which might be occasioned by the non-payment thereof," and the creditors further in consideration of the assignment and covenants released the debtors from all debts, actions, &c., which

they (the creditors) might have in respect of any transaction up to the date of the assignment.

The plaintiffs accepted the trusts of the indenture, and the keys of the premises were given to one of them, and they advertised the business for sale and endeavoured to sell it with the plant and stock-in-trade as a going concern, but the debtors were allowed to continue in apparent possession of the stock-in-trade and other property comprised in the assignment, and continued to carry on such business as they were doing at the time of the assignment without any ostensible interference by the plaintiffs.

At the time of the execution of the assignment the debtors were traders within the meaning of the Bankruptcy Act, 1869, and were in insolvent circumstances. Some of the instalments due to the defendants had been paid, and the debt had been reduced to 39*l.* 10*s.* The defendants did not execute or assent to the assignment, though asked to do so. The whole amount of the debts of the debtors was 432*l.* 15*s.* 5*d.*, and creditors to the amount of 363*l.* 1*s.*, including the plaintiffs, who were creditors to a large amount, assented to and signed the deed.

The assignment was executed for the purpose of enabling the business of the debtors to be sold as a going concern, by which it was estimated it would have realised 50 per cent. more than if the plant and stock-in-trade had been sold separately, and also for the purpose of securing the equal distribution of the proceeds of the sale amongst all the creditors of the debtors. The defendants contended that it was executed for the purpose of defeating any executions which might be levied on the debtors' property, and of defeating the defendants' bill of sale, and they relied on the provisions of the assignment as shewing such intention. The plaintiffs contended that this was not so. The facts were that default had been made in payment of the monthly instalments due under the bill of sale in May and June, 1878. No creditor (except creditors who assented to the assignment) was pressing the debtors. A judgment creditor had put in an execution on Boldero & Foster's goods, and they, with the two largest creditors, then consulted a firm of solicitors, who advised that nothing could be done till the judgment creditor was paid. The debtors possessed no ready money, but they succeeded in borrowing some for

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the purpose, and paid the execution creditor out. The assignment was then executed at the suggestion and under the advice of the solicitors who prepared it, and who were instructed by the debtors and the two creditors to the largest amount. The solicitors did not then know, and were not informed until some time afterwards, of the bill of sale having been executed to the defendants. The debtors and the plaintiff Bleach, who knew the fact, did not know whether or not the bill of sale would be defeated by the assignment, and had no intention one way or the other upon the question of defeating the bill of sale, which was not present to their minds. The debtors desired to do what they were advised was best for their creditors, and denied that they had any intention of giving any preference to any one or more of their creditors over any other one or more of them, or of defeating or delaying any one or more of their creditors. The assignment was not registered as a bill of sale.

In September, 1878, default had been made by the debtors in payment of four instalments due under the bill of sale, and the defendants, besides seizing and placing a man in possession of the stock-in-trade and effects comprised therein, issued a writ against one of the debtors and obtained judgment, under which the goods were seized. Notice was given to the sheriff of the claim of the plaintiffs to the goods, and he interpleaded.

The Court were to have power to draw inferences of fact; and the question for their opinion was whether the goods seized by the sheriff, or any of them, were at the time of the seizure the property of the plaintiffs as against the defendants.

Channell, for the plaintiffs, contended that the assignment was for the benefit of the creditors of the person making it, and within the exception of s. 7 of 17 & 18 Vict. c. 30, and was therefore not a bill of sale: *General Furnishing and Upholstery Company* v. *Venn* (1); and that the assignment was not void under 13 Eliz. c. 5: *Alton* v. *Harrison* (2); and distinguished the case from *Spencer* v. *Slater*. (3)

Clay, for the defendants, contended that the assignment should

(1) 2 H. & C. 153. (2) Law Rep. 4 Ch. 622.
(3) 4 Q. B. D. 13.

be for the benefit of all creditors, and that the resulting trusts in favour of the debtors tended to defeat or delay creditors who had not assented.

Channell, was not heard in reply.

POLLOCK, B. I think no reasonable doubt can be entertained in this case. The question whether the goods were the property of the plaintiffs depends on whether the assignment of the 10th of July, 1878, whereby the debtors assigned to the plaintiffs as trustees for the creditors, can be upheld. Two grounds were taken, the first of which was that the assignment was unregistered. The answer to this is clear, that this deed was within s. 1 of the Bills of Sale Act, and also within the interpretation of s. 7 as an assignment for the benefit of creditors. If any authority were necessary for this proposition it would be found in the case of *General Furnishing and Upholstery Company* v. *Venn* (1), where it was held that a deed intended to operate under the then existing Bankruptcy Act was good as an assignment at common law for the benefit of all the creditors. The other question is, whether the assignment comes within 13 Eliz. c. 5, and is fraudulent and void under that statute as tending to defeat or delay creditors.

The case before us is not like that of *Spencer* v. *Slater* (2) for there is this great distinction, that here the primary object was a transfer for purposes of sale as a going concern, and not for the purpose of carrying on the business. It is quite true that the trustees, in the event of their not being able to sell the business at once, would be obliged to keep it going, and for this reason power is given them to pay to the debtors such allowance for their maintenance or otherwise as the trustees may think fit, and this under the circumstances is a necessary power. The defendants further rely on the general tendency of the deed itself, and argue that on the whole the deed sweeps away all that the creditors have to look to, and so defeats the claims of such of them as are not assenting. But we are here dealing, not with the bankruptcy law, but with the statute of Elizabeth, and, without going back to older cases, as Lord Justice Giffard pointed out in *Alton* v. *Harrison* (3), the statute of Elizabeth does not touch the question

(1) 2 H. & C. 153. (2) 4 Q. B. D. 13.

(3) Law Rep. 4 Ch. 622.

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of equal distribution of assets. This assignment therefore, though it preferred certain creditors and tended to defeat the others, might be good.

In *Spencer* v. *Slater* (1) there were special circumstances. In the first place, the deed contained not merely the ordinary resulting trusts as to the surplus which would be found in every deed, but a resulting trust, under which at the expiration of twelve months the debtor might apply to the trustees to be paid the dividends of creditors who neglected or refused to assent to or execute the deed, and then, if the creditors did not within seven days assent or execute, the money was to be paid to the debtor; this was clearly much beyond the ordinary resulting trust: then again, as I have already mentioned in that case, the primary trust was to carry on the business, here the principal object is to sell the business, and it is subsidiary to that object that power should be given to carry it on till the sale. In that case too there was a very special and general indemnity. It is quite right that trustees should be indemnified in certain cases, such, for instance, as their having to indorse bills of exchange, and that is what is found in this case. The indemnity in *Spencer* v. *Slater* (1) went very much further, and from all the circumstances of that case taken together the Court came to the conclusion that they ought to draw the inference that the assignment was intended to defeat creditors, and was therefore void under the statute of Elizabeth. The circumstances here are, as I have pointed out, very different, and would not warrant us in arriving at the same conclusion. Our judgment will therefore be for the plaintiffs.

HUDDLESTON, B., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Heather & Sons.*
Solicitors for defendants: *G. J. & P. Vanderpump.*

(1) 4 Q. B. D. 13.

[IN THE COURT OF APPEAL.]

1879
Nov. 15.

STEVENS *v.* SAMPSON.

Libel—Privileged Communication—Report of Proceedings before a Court of Justice.

A true report of the proceedings in a Court of Justice sent to a newspaper by a person, who is not a reporter on the staff of the newspaper, is not privileged absolutely; and if it be sent from a malicious motive an action will lie.

CLAIM for falsely and maliciously printing and publishing of the plaintiff certain words in certain newspapers. The libel set out in the claim was a report, published by the defendant, of certain proceedings in a plaint of *Nettlefold* v. *Fulcher*, tried at the Marylebone county court, and brought to recover damages and costs sustained by Nettlefold in setting aside certain proceedings instituted by Fulcher against Nettlefold to recover the possession of certain premises. It alleged that at the county court the defendant in the present action appeared for Nettlefold, and made statements regarding the conduct of the plaintiff in the present action, who was a debt collector and employed by Fulcher as agent to recover possession of the premises.

Statement of defence: 1. A denial that the defendant published the words. 2. That the words alleged to have been published were a true and correct account and report of a certain trial in a court of justice having jurisdiction in that behalf, and of certain words spoken during the sitting of the Court in the course of the trial, and published for the public benefit, and without malice. 3. That the matters alleged to have been published were true in substance and in fact, and a denial that the plaintiff had sustained any damage. Issue thereon.

At the trial before Cockburn, C.J., at the Hilary Sittings, 1879, at Westminster, it was proved that the defendant, who was a solicitor, had sent the report set out in the claim of the trial of *Nettlefold* v. *Fulcher*, before the Judge of the Marylebone county court, to the local newspapers. Cockburn, C.J., left two questions to the jury: 1. Was the report a fair one? 2. Was it sent honestly, or with a desire to injure the plaintiff? The jury

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answered these questions: 1. That it was in substance a fair report: 2. That it was sent with a certain amount of malice: and found a verdict for the plaintiff with 40*s.* damages. Cockburn, C.J., directed judgment to be entered for the plaintiff for that amount.

The defendant appealed on the ground that the judgment entered upon the findings of the jury was wrong; and that it should have been directed to be entered for the defendant, the jury having found that an alleged libel, being a report in certain newspapers of proceedings which took place in a court of justice, was a fair report of the proceedings.

Harris, and *Poulter*, for the defendant. The judgment ought to be entered for the defendant, for a true report of proceedings in a court of justice is privileged absolutely, *Hoare* v. *Silverlock* (1); *Lewis* v. *Levy*. (2) The motive that the defendant had for sending the report is immaterial. All the public have a right to be present in a court of justice and hear the proceedings. The defendant by the publication of the report has made the proceedings, which were accessible to all who were present, universally known. The publication, though to the disadvantage of a particular individual, is of importance to the public, and it is, therefore, privileged. It would appear from a dictum of Lord Campbell in *Andrews* v. *Chapman* (3), that the publication of proceedings in a court of justice is absolutely privileged; he says, "if what is stated is substantially a fair account of what took place, there is an entire immunity for those who publish it:" and Coleridge, J., expressed the same view in *Smith* v. *Scott*. (4)

J. E. Palmer and *Ladbury*, for the plaintiff, were not called upon.

LORD COLERIDGE, C.J. The question before us is whether, on the findings of the jury, the entry of the judgment for the plaintiff is right. I am of opinion that it was rightly entered for the plaintiff. The principle which governs this case is plain. It is like that which governs most other cases of privilege. In order, in cases of libel, to establish that the communication is privileged,

(1) 9 C. B. 20; 19 L. J. (C.P.) 215.
(2) 27 L. J. (Q.B.) 282.
(3) 3 C. & K. 286, at p. 289.
(4) 2 C. & K. 581, at p. 585.

two elements must exist; not only must the occasion create the privilege, but the occasion must be made use of bonâ fide and without malice; if either of these is absent, the privilege does not attach; here the second element is absent, for bona fides is wanting, and malice exists. There are certain cases in which the privilege is absolute. Words spoken in the course of a legal proceeding by a witness or by counsel, and words used in an affidavit in the course of a legal proceeding are absolutely privileged. It is considered advantageous for the public interests that such persons should not in any way be fettered in their statements. This is the first time that a report of proceedings in a court of justice has been sought to be brought within this same class of privilege. I am not disposed to extend the bounds of privilege beyond the principles already laid down, and I find no authority for its extension.

BRAMWELL, L.J. I am of the same opinion. The publication complained of is a libel. It comes within the definition of a libel, and the jury have found that it is a libel. The only defence is that the publication is privileged. The term "privilege" is a word often used very inaccurately. In this particular case it is said the libel is a fair and correct report of certain proceedings in a court of justice, at which the public have a right to be present, and that its publication was with a view of giving information to the public, and therefore the communication is privileged; but it must be shewn that the defendant did act under the privilege. The jury have found that the report was sent with a certain amount of malice. The defendant did not act under the privilege; his motive for the publication was not a desire to give information to the public. Cases may be put of an answer to an application for the character of a servant, and the sending of a report of proceedings to a newspaper by an ordinary reporter. Suppose a man be applied to for the character of a servant, and he is angry with that servant, and says "he is a bad servant, he has stolen my spoons;" that communication would be privileged if the man has acted bonâ fide, intending honestly to discharge a duty. It is a privilege created by the application of the servant. It must be taken that he said what he did in answer to what

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was asked of him by the servant through the new master. So in the case of an ordinary reporter of a newspaper. But the present is not a case of the privilege of the press. If the defendant can justify himself here, it would be a justification whether the publication was in a book or in a newspaper. He would be in the same plight that he is now. Suppose a reporter for the press bore malice towards a person, a party to an action, and published a fair report of proceedings injurious to him, I incline to think that, as he would be performing a kind of duty, it ought to be taken that he is acting under privilege. I do not think the public press has any peculiar privilege. However, I only throw this out as a suggestion, and it is unnecessary to decide the point. There is, however, a plain distinction between that case and the present, where the defendant is a volunteer. I think, therefore, the jury having found that the defendant was not acting under the privilege, he is liable to the action.

BRETT, L.J. It seems to me that the verdict of the jury means that the defendant did not send this report to be published for the benefit of the public in a matter as to which they ought to be informed, but from a desire to injure the plaintiff. Assuming the report to be a fair and correct account of the proceedings in a court of justice, was it privileged? It seems to me that, whatever privilege is relied upon in an action, the defendant is bound to prove that the occasion is privileged, and that he used the occasion in a privileged way. He is bound to shew that he used the privilege bonâ fide and without malice; if he fails in either of these incidents, he fails to shew that the communication is privileged. The defendant, in order to establish his defence, must shew that the report was substantially correct and that this substantially correct report was made without malice. It is said that the publication of proceedings in a court of justice is a case of absolute privilege, but there is no authority for that statement, and the case comes within the general rule. The defendant has failed to make out the defence he has put on the record.

Judgment affirmed.

Solicitor for plaintiff. *T. Johnson.*
Solicitor for defendant: *The defendant in person.*

GILBERTSON, APPELLANT; FERGUSSON, RESPONDENT. 1879

July 4.

Income Tax—Foreign Corporation—Dividends payable to Shareholders in the United Kingdom—Money intrusted to Agents for Distribution—16 & 17 *Vict.* c. 34, s. 10.

A foreign company, carrying on business and earning profits abroad, had an agency in London, which conducted a branch and earned profits. The dividends of the company were payable, at the option of the shareholders, abroad or by the London agency. In a particular year the London agency earned an amount of profits which enabled them to pay all the dividends demanded of them in that year, without requiring or obtaining any remittance from the company abroad. The London agency were assessed to income tax under Schedule D on the profits earned in the United Kingdom on an average of the three preceding years, the amount on which they were so assessed being less than the amount actually earned by them in the year. They further made a return under 16 & 17 Vict. c. 34, s. 10, that no interest, dividends, or other annual payments, payable out of or in respect of the stocks, funds, or shares of the company, had been intrusted to them for payment in the United Kingdom, and appealed against an assessment of the commissioners whereby they were assessed in respect of the dividends paid by them:—

Held, by a majority of the Court (Pollock and Huddleston, BB.), that the money in the hands of the London agency for the payment of dividends in the United Kingdom was intrusted to them within the meaning of 16 & 17 Vict. c. 34, s. 10, and they were liable to be assessed on the full amount of such dividends, but that since the dividends were payable out of the general earnings of the company, consisting of profits made partly in the United Kingdom and partly elsewhere, and the London agency had already been assessed to income tax on the former under Schedule D., they ought only to be further assessed, under 16 & 17 Vict. c. 34, s. 10, and pay income tax, in respect of that portion of the dividends which represented profits arising out of the United Kingdom.

By Kelly, C.B. (dissenting), that the money in the hands of the London agency having sufficed to pay the dividends payable in the United Kingdom, no money had been intrusted to the London agency for that purpose within 16 & 17 Vict. c. 34, s. 10.

CASE stated for the opinion of the Court by the commissioners for the special purposes of the Income Tax Acts.

1. The question for the opinion of the Court is, whether any portion of the profits made out of the United Kingdom by a Turkish corporation carrying on business in Constantinople, London, and elsewhere, under the name of the Imperial Ottoman Bank, and not actually remitted to the United Kingdom, is, as profits, or as forming part of dividends paid in the United Kingdom, the subject of assessment to income tax under schedule D

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of the Act 16 & 17 Vict. c. 34, in the circumstances hereinafter appearing, and, if any, then whether either of the assessments for the year 1874–75, which have been made by the commissioners for special purposes on the appellant has been made upon the right principle, or upon what principle an assessment should have been made.

3. By the Act 16 & 17 Vict. c. 34, certain duties are granted to her Majesty upon profits arising from property, professions, trades and offices (inter alia), s. 2.

SCHEDULE D.

For, and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall respectively be carried on within the United Kingdom or elsewhere.

And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident in the United Kingdom, from any profession, trade, employment, or vocation exercised within the United Kingdom.

4. By s. 5 of 16 & 17 Vict. c. 34, the duties imposed by that Act are directed to be assessed under the regulations of 5 & 6 Vict. c. 35, and the Acts therein mentioned or referred to.

5. By s. 23 of 5 & 6 Vict. c. 35, provision is made for the appointment of commissioners for the special purposes of that Act. (1)

19. By 5 & 6 Vict. c. 80, s. 2, all persons intrusted with the payment of annuities or any dividends or shares of annuities payable out of the revenue of any foreign state to any persons, corporations, companies, or societies in Great Britain, or acting therein as agents, or in any other character, are to deliver to the commissioners for special purposes true and perfect accounts of the amount of the annuities, dividends and shares payable by them respectively, and the commissioners are to make an assessment thereon, and the persons intrusted with such payments are to pay the duty on the annuities, dividends and

(1) A number of the sections of this Act were set out in the case, which it is unnecessary to insert in the report.

shares on behalf of the persons, corporations and companies entitled unto the same out of the moneys in their hands.

20. By 16 & 17 Vict. c. 34, s. 10, the provisions of the last mentioned Act for the assessing and charging the duties on dividends and shares of annuities payable out of the revenue of any foreign state are extended to all interest, dividends or other annual payments payable out of or in respect of the stocks, funds or shares of any foreign company, society, adventure or concern, or in respect of any securities given by or on account of any such company, society, adventure or concern, which interest, dividends or annual payments have been or shall be intrusted to any person in the United Kingdom for payment to any persons, corporations, companies, or societies in the United Kingdom, and all persons intrusted with the payment of any such interest, dividends or other annual payments as aforesaid in the United Kingdom, or acting therein as agents, or in any other character, shall do and perform all such acts, matters and things in order to the assessing and charging and paying of the said duties on all such interest, dividends and other annual payments as aforesaid, as by the said Act of 5 & 6 Vict. c. 80, persons intrusted with the payment of annuities or any dividends or shares of annuities are required to do and perform.

21. By a series of subsequent Acts the duties of income tax granted by 16 & 17 Vict. c. 34, have been continued at various rates until the present time. The Act imposing the duty for the year ending on the 5th of April, 1875, was The Customs and Inland Revenue Act, 1874 (37 & 38 Vict. c. 16).

22. Towards the close of the year 1862 the Ottoman Bank of London, which was a banking company established in London, and carrying on business there with a branch at Constantinople arranged to transfer its business to the Imperial Ottoman Bank, which was a Turkish corporation incorporated according to the laws of Turkey by a firman of the Sultan.

23. The transfer of the business was completed in the beginning of the year 1863 by the issue of shares in the capital of the Imperial Ottoman Bank to the amount of 250,000*l.* to the shareholders of the Ottoman Bank of London, and the business in London of the Imperial Ottoman Bank as bankers was then

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commenced in London under the management of the London members of the committee, hereinafter referred to, in the premises theretofore occupied by the Ottoman Bank of London; the remainder of the capital was subscribed in Constantinople, Paris, London, and other places. Immediately on the formation of the Imperial Ottoman Bank preparations were made to commence business in Constantinople, and it actually commenced business there on the 1st of June, 1863.

24. The affairs of the Imperial Ottoman Bank (hereinafter called the bank) were regulated by a concession from the Government of Turkey and certain statutes of the 17th of February, 1875.

25. By the concession, the bank is a State bank for the Ottoman Empire, and is established subject to the general laws of the Empire, with its seat fixed at Constantinople, and power to establish branches and agencies at other places, and it is provided that the bank shall be administered at Constantinople by a board of two or three members, and a council of administrators of three members, both to be named by a committee, chosen by the London and Paris founders, and this committee is to have power in conformity with the statutes to guide, control and superintend the operations of the bank.

26. By the statutes above referred to, it is declared that the bank is formed for the purpose of carrying into effect the privilege of the bank as defined in the concession, and the operations to be undertaken are defined in accordance with the concession. The capital of the bank is divided into shares of 500 francs, or 20*l.* each, and the liability of the shareholders is limited to the amount of their shares. There is no register of shares, but, according to the provisions of the statutes, all the certificates of shares are made out to bearer, and the shares themselves are transferable by delivery of the certificates, and the dividends payable thereupon are payable at the option of the holders at Constantinople, Paris or London, by means of coupons attached to the certificates.

27. By the statutes the administration of the bank in Constantinople is confided to a director general, one or two assistant directors, and a council of administration of three directors. These are appointed by a committee of from twenty to twenty-five members, of whom ten at least must be English, or resident

in England, and ten at least French, or resident in France. This committee has the general guidance, control and superintendence of the operations of the bank, and its members are elected by the general meeting of shareholders. The statutes further require that the committee shall meet four times a year alternately in London and Paris, and the committee has, in fact, met and still does meet sometimes in London and sometimes in Paris. The execution of the decisions of the committee and the more immediate supervision of the affairs of the bank is assigned under the statutes to a sub-committee appointed by a general committee, consisting of eight members, of whom four are chosen from the English and four from the French section of the general committee.

28. It is provided by the statutes that the English members of the committee shall be charged under the control of the sub-committee with the management of the London agency of the bank, and since the early part of 1863, when the business of the bank in London commenced until the present time, the London business of the bank, being the ordinary business of bankers, has been carried on under the management of the English members of the committee in premises in the city of London.

29. It is provided by the statutes that the annual general meetings of the shareholders in the bank, and all extraordinary general meetings shall be held at such places as the committee shall fix, and at the annual general meetings the report of the committee on the state of affairs of the bank is received, the accounts are discussed, approved or rejected, the dividends are fixed and declared, and members of the committee are elected. The general meetings have in fact always been and still are held in London.

30. According to the translation of the statutes furnished to the commissioners for special purposes articles 41 and 42 of these statutes are in the terms following:—

"Article 41. At the end of each of the company's years, a general inventory of the assets and liabilities is drawn up by the sub-committee and confirmed by the committee. The accounts are submitted to the general meeting which approves or rejects and fixes the dividends after having heard the report of the committee.

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"Article 42. The net proceeds after deducting all expenses constitute the profits. Out of these profits there is taken, in the first instance, annually—

"1st. Five per cent. on the capital of the shares issued to be distributed among the shareholders by way of dividend on account.

"2nd. Ten per cent. of the profits for the reserve fund.

"The surplus is divided in the proportions of nine-tenths for the shares by way of dividend, the remaining one-tenth is divided into moieties, of which one is for the founders and the other for the members of the committee and the administrative council.

"The part coming to the founders in the division of the annual profits and in the reserve fund shall be in the proportions fixed by their private agreements represented by special certificates whose form the committee shall determine; the payment of the dividends voted by the general meeting is made at the times fixed by the committee."

32. On or about the 16th day of November, 1875, two returns for income tax for the year ending the 5th of April, 1875, were made by the appellant, one being in respect of the English profits of the bank, and the other being in respect of the dividends of the bank.

The return in respect of the English profits was:—

"The London Agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople in the empire of Turkey.

"The amount of profits and gains accruing to the bank from the trade of banker exercised within Great Britain, viz., at London for the year ending the 5th of April, 1875, computed on a just and fair average of three years ending the 31st of December, 1873, the last mentioned day being the day on which the accounts of the said bank have been usually made up, is 81,477*l.* 14*s.* 8*d.*

The return in respect of the dividends of the bank was:—

"There were no interest, dividends or other annual payments payable out of or in respect of the stocks, funds, or shares of the said Imperial Ottoman Bank, and (within the meaning of the said Act (1)) intrusted to the said London Agency, for payment

(1) 16 & 17 Vict. c. 34, s. 10.

to persons, corporations, companies, or societies, in the United Kingdom, and payable by the said London Agency, for the year ending the 5th of April, 1875."

34. Before and at the time when the above returns were transmitted to the surveyor of taxes (the respondent) the secretary of the London Agency furnished a statement, shewing how the sum of 81,477*l.* 14*s.* 8*d.*, mentioned in the return in respect of the English profits, was arrived at, such statement being as follows:—

The English profits for the year ending—

31st December, 1871, were .	£69,118	1	0
„ 1872 . .	76,070	18	10
„ 1873 . .	99,244	4	4
3)	244,433	4	2
Return for 1874–75 .	£81,477	14	8

and a further statement of the amounts of dividends paid in England out of the profits of the bank in the course of the financial years 1871–72, 1872–73, 1873–74 and 1874–75, and such amounts were thereby shewn to be respectively 165,344*l.* 10*s.*, 189,694*l.* 10*s.*, 169,081 2*s.*, and 98,322*l.* 10*s.* It was also thereby shewn that in the year 1871–72 there was in the hands of the London Agency money derived from profits made in England amounting to 69,118*l.* 1*s.* which the agency applied towards payment of the said dividends, and that the amount to make up the said sum of 164,344*l.* 10*s.*, viz., 95,226*l.* 9*s.*, was remitted from abroad out of the foreign profits of the bank; that in the year 1872–73 the amounts so applied and remitted respectively were 76,070*l.* 18*s.* 10*d.* and 113,623*l.* 11*s.* 2*d.*; that in the year 1873–74 the amounts so applied and remitted respectively were 99,244*l.* 4*s.* 4*d.* and 69,836*l.* 17*s.* 8*d.*, and that in the year 1874–75 the amount of English profits (145,539*l.* 0*s.* 2*d.*) being in excess of the amount required for the dividends payable in England, no remittance from abroad out of foreign profits was required or made towards payment of the said sum of 98,322*l.* 10*s.*

35. The commissioners for special purposes in the first instance made an assessment for the year 1874–75 (hereinafter called the assessment on English profits) in respect of the profits of the bank

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upon the sum of 81,477*l.* 14*s.* 8*d.* for the English profits in conformity with the return, and duty was charged upon that sum accordingly. This assessment was not objected to and no question arises upon it.

The commissioners then proceeded to consider the return in respect of the dividends of the bank, and were of opinion that in making that return the appellant had taken an erroneous view of the liability of the English committee with reference to the provisions of s. 10 of the Act 16 & 17 Vict. c. 34, and having no information as to the proportion of the said sum of 98,322*l.* 10*s.* paid in dividends in England in the year 1874–75 which represented English profits, and had been included in the assessment on English profits, they made an assessment (hereinafter called the assessment on dividends) upon the whole of the said sum of 98,322*l.* 10*s.*

In giving notice to the appellant of the assessment on dividends the commissioners left the English members of the committee to prove upon appeal what amount should be deducted as having been included in the assessment on the English profits.

36. The appellant on behalf of the English members of the committee or the London Agency, appealed against the assessment on dividends to the commissioners for special purposes, and upon the hearing of the appeal on the 14th day of January, 1876, it was stated by the commissioners that in case s. 10 of the Act 16 & 17 Vict. c. 34, was inapplicable to the bank or did not in circumstances warrant any assessment on dividends, they should, under the authority vested in them by law, make an assessment under the provisions of the third rule applicable to the two first cases of schedule D in s. 100 of 5 & 6 Vict. c. 35, in addition to the assessment on English profits so as to cover the foreign profits of the bank to the extent to which in the opinion of the commissioners they were liable to income tax. It was, therefore, arranged between the commissioners and the appellant that the hearing of the appeal should be adjourned, and that the commissioners should forthwith make such assessment in respect of foreign profits as they should think proper as an alternative assessment, and that an appeal therefrom, and the previous appeal so adjourned should come on for hearing on the same day.

37. On the 20th day of January, 1876, the commissioners for special purposes made an assessment (hereinafter called the assessment on general profits) upon the sum of 115,935*l.*, which they ascertained to be the amount on an average of the three preceding years of the proportion of the foreign profits distributed in dividends in England, and which sum, with the addition of the sum of 81,477*l.* 14*s.* 8*d.*, the amount of the assessment on English profits, amounted to a total assessment in respect of profits of 197,412*l.* 14*s.* 8*d.*

The way in which the commissioners arrived at the foregoing result is shewn by the following statement of account:

1871. Total dividend paid in England and abroad		£273,375
Dividend paid in England		£164,344
English profits		£69,118
As 273,375 : 69,118 :: 164,344 : 41,551		
Subtract the 4th term	41,551	
Portion of English dividend composed of foreign profits	£122,793	
Composed of English profits	69,118	
Total profits assessable	£191,911	
1872. Total dividend paid in England and abroad		£283,500
Dividend paid in England		£189,694
English profits		£76,070
As 283,500 : 76,070 :: 189,694 : 50,899		
Subtract 4th term	50,899	
Portion of English dividend composed of foreign profits	£138,795	
English profits ...	76,070	
Total profits assessable	£214,865	

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1873. Total dividend paid in England and abroad £202,500

Dividend paid in England £169,081

English profits £99,244

As 202,500 : 99,244 :: 169,081 : 82,865

Subtract 4th term 82,865

Portion of English dividend composed of foreign profits £86,216

English profits ... 99,244

Total profits assessable £185,460

Total profits assessable for 1871	...	£191,911
Do. „ „ 1872	...	214,865
Do. „ „ 1873	...	185,460
	3)	592,236
Average for assessment	...	£197,412

In making the assessment the commissioners regarded all the shareholders in the bank who were resident in England, as carrying on business in England and abroad jointly with the shareholders resident abroad, and the English committee as the accountable and chargeable persons under the provisions contained in the third rule applicable to the two first cases of schedule D, in s. 100 of the Act 5 & 6 Vict. c. 35, in respect of the profits of the bank, so far as they were liable to income tax.

38. On the same day on which the assessment on general profits was made, the commissioners for special purposes sent a notice thereof.

39. The appellant signified his intention to appeal to the commissioners for special purposes against the assessment on general profits, and on the 26th day of January, 1876, that appeal and the adjourned appeal against the assessment on dividends came on for hearing.

40. At such hearing it was stated on the part of the appellant

that no technical objection was or would be taken to the assessment or the mode in which they had been made, but that objection was taken upon the simple ground that the whole liability of the appellant and the other English members of the committee either as representing the London Agency of the bank, or on the part of themselves and the other shareholders in the bank in respect of income tax upon the profits of the bank had been discharged by the assessment for the English profits and the payment of income tax upon that sum. In support of that objection it was alleged that it was decided by the Court of Exchequer in the case of the *Attorney General* v. *Alexander* (1) that the bank was chargeable to income tax in respect of the English profits only, and that the bank could not be regarded otherwise than as a person residing out of the United Kingdom and carrying on business in the United Kingdom through an agent. It was further urged that the bank having a foreign incorporation must be regarded as a corporate body or entity for all purposes connected with the income tax and that the commissioners for special purposes had no power to make any assessment upon the shareholders in the bank in respect of these dividends or shares of the profits thereof. It was further urged that the provisions of the Income Tax Acts, with the exception of the provisions contained in s. 10 of the Act, 16 & 17 Vict. c. 34, were such as to restrict the obligation of the agent of a foreign corporation to make a return of profits of the corporation to a return of the profits made in the United Kingdom, and consequently to restrict the charge of income tax to the profits so made. It was further urged that inasmuch as all dividends paid in the United Kingdom in the year 1874–75 were paid out of English profits retained by the English members of the committee for the purpose, no dividends payable on the shares of the bank were intrusted to such members or any person for payment in the United Kingdom, and that consequently no return could be called for and no assessment could be made by reference to the said s. 10 of the Act, 16 & 17 Vict. c. 34.

41. It was submitted on the part of the respondent that in the case of the *Attorney General* v. *Alexander* (1), the Court of

(1) Law Rep. 10 Ex. 20.

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Exchequer decided nothing more than that the bank was not chargeable as a person residing in the United Kingdom.

With respect to the assessment on general profits it was urged on the part of the respondent that, where persons (some of whom reside while the others do not reside in the United Kingdom) carry on a concern jointly in the United Kingdom and elsewhere, the annual profits arising to such persons from the concern are chargeable under schedule D of the Act 16 & 17 Vict. c. 34, and the third rule applicable to the two first cases of schedule D, as stated in s. 100 of the Act 5 & 6 Vict., c. 35. And that the fact of such persons having formed themselves into a body which has been incorporated by a firman of the Sultan does not diminish their liability or deprive the Crown of the income tax which would have been payable if there had been no such incorporation. It was also urged that whatever may have been the effect of the Turkish incorporation, it was not such as to bring the bank within the meaning of the expression "bodies politic or corporate," in s. 40 or s. 192 of the Act 5 & 6 Vict., c. 35, or to make the bank chargeable as a company or corporation under the general provisions of the Income Tax Acts.

With respect to the alternative assessment, viz., the assessment on dividends made with reference to s. 10 of the Act 16 & 17 Vict., c. 34, it was urged on the part of the respondent that the appropriation by the English members of the committee, of the whole of the English profits to the payment of dividends to a certain class of shareholders, viz., those whose dividends were paid in London, could not have the effect of depriving the Crown of income tax upon so much of the foreign profits as must be considered to have formed part of such dividends. It was also submitted that the construction of the said s. 10, for which the appellant contended, viz., the limitation of the expression "dividends intrusted" to moneys actually remitted by the bank from abroad for distribution in dividends in London, was manifestly opposed to the intention of the legislature in the application of the section to the case of a foreign corporation, carrying on business and making profits in the United Kingdom and abroad.

42. The commissioners for special purposes concurred in the

views put forward on behalf of the respondent, and upon consideration of the general question involved in the alternative assessments, were of opinion that the contention on the part of the appellant that the assessment on English profits was to be regarded as embracing and satisfying the whole liability of the appellant and the other members of the English committee in every aspect of the case could not be supported in point of law in the state of facts which has been hereinbefore set forth, because the practical result of yielding to such contention would be to free from income tax either the portion of the foreign profits which should be regarded as forming part of each dividend paid to a shareholder in the United Kingdom or the portion of the English profits which should be regarded as forming part of each dividend paid to a shareholder abroad.

The commissioners therefore were of opinion that one of the two assessments, viz., the assessment on dividends, and the assessment on general profits, was right, and, inasmuch as it was the desire of the persons who represented the appellant and the Crown at the hearing of the combined appeals that all the points affecting the liability to income tax should be brought before the Court upon a case to be stated, they determined to confirm the two alternative assessments.

43. The assessments were accordingly confirmed, subject to a case for the opinion of the Exchequer Division of the High Court of Justice according to the Act 37 & 38 Vict., c. 16.

The case was argued on the 28th of February and the 1st and 3rd of March, 1879.

Henry Matthews, Q.C. (*Bosanquet,* with him), for the appellant.
Sir John Holker, A.G. (*Dicey,* with him), for the Crown.

Cur. adv. vult.

July 4, 1879. The Court differing in opinion, the following judgments were delivered:—

HUDDLESTON, B. The legislature has provided by 16 & 17 Vict. c. 34, s. 2, schedule D, that income tax shall be paid on the annual profits or gains arising or accruing from any profession, trade, employment, or vocation by persons residing in the United

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Kingdom, whether the profession, &c., be carried on in the United Kingdom or elsewhere, and by persons whether subjects of her Majesty or not, although not resident in the United Kingdom, where those profits or gains arise or accrue from the profession, &c., exercised within the United Kingdom.

The Imperial Ottoman Bank carried on business as bankers in Constantinople and in London, and their profits in the year 1875 were gained or accrued from business carried on in the United Kingdom and out of the United Kingdom.

It was held in *Attorney General* v. *Alexander* (1) that the Imperial Ottoman Bank was not liable to be assessed to income tax in respect of its whole profits as a "person residing within the United Kingdom," under the 1st clause of schedule D, but was liable in respect of the profits arising from its business carried on in the United Kingdom under the 2nd. The profits arising from its business carried on in the United Kingdom for the year ending the 5th of April, 1875, were ascertained under the provisions of the 5 & 6 Vict. c. 35, s. 100, first case of rules of the statute, upon an average of three years, to be 81,477*l.* 4*s.* 8*d.*, and on this amount the Imperial Ottoman Bank admit they are liable to be assessed to the income tax, but contend that they are not liable to be assessed to, or to pay more.

The annual profits of the Imperial Ottoman Bank arising from their whole business both in and out of the United Kingdom are after certain deductions divided equally amongst the shareholders, and the dividend is paid on coupons attached to the shares when presented for payment. In the year 1874–75 98,322*l.* 10*s.* was paid in London by the London branch of the Imperial Ottoman Bank as dividend on shares presented there. Each person receiving his dividend was liable to pay income tax thereon under the first clause of schedule D, and it was admitted in argument that in practice income tax was deducted on payment of the dividend by the London branch of the Imperial Ottoman Bank.

By the provisions of 5 & 6 Vict. c. 80, s. 2, and 16 & 17 Vict. c. 34, s. 10, all persons intrusted with the payment of dividends in respect of shares of any foreign country to any persons in Great

(1) Law Rep. 10 Ex. 20.

Britain shall deliver to the commissioners for special purposes an account of the dividends and shares intrusted to them for payment, and the commissioners shall make an assessment thereon giving notice of the amount of such assessment to the persons intrusted who shall pay the duty, that is the income tax, on those shares on behalf of such persons in Great Britain, out of the moneys in their hands.

The Imperial Ottoman Bank in London were persons intrusted with the payment of the 98,322*l.* 10*s.*, the dividend on the shares presented in London, and as such persons so intrusted were entitled to deduct the income tax from the dividend holder, and therefore must pay and be assessed for the amount.

Each dividend paid represents a portion of profits arising in the United Kingdom and a portion of profits arising out of the United Kingdom. As they have already been assessed for that portion of the profits arising in the United Kingdom in the 81,477*l.* 4*s.* 8*d.* they have a right to retain so much of that income tax as would be applicable to that portion otherwise they would be charged twice over, but with reference to so much of the income tax as is applicable to the portion representing profits out of the United Kingdom they must pay that over to the commissioners under the provisions of the two last statutes referred to, and must be assessed for the same.

It was urged that the Imperial Ottoman Bank were only liable to pay upon the amount of their profits in the United Kingdom, and upon any sum remitted to them beyond those profits to enable them to pay dividends in the United Kingdom, but where the profits in the United Kingdom were less or equal to the dividend to be paid in the United Kingdom they were to pay nothing more.

I find no such word as "remitted" in any of the statutes. When they are intrusted with the amounts to pay the dividend, they are to pay, out of the moneys in their hands, that is out of the money intrusted to them, the amount of each dividend, less the income tax to the coupon holder in the United Kingdom and the amount of the income tax to the commissioners.

The amount of income tax to be paid is not to be regulated by any system of bookkeeping or practice the Imperial Ottoman Bank may adopt.

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It might be that the whole of the profits made in the United Kingdom were transmitted to Constantinople, and yet a sufficient amount arising on financial operations remained in the hands of the Imperial Ottoman Bank in London out of which they were intrusted to pay the coupon holders in the United Kingdom, or that there was sufficient in the Imperial Ottoman Bank in London to enable them to hold to the credit of the bank in Constantinople the whole of the profits made in the United Kingdom, and besides to pay the dividends on the coupons in the United Kingdom; or it might be at the particular period of a financial year when the dividend had to be paid that there was no balance in the hands of the London house, and the whole had to be remitted from Constantinople. Could it be said that in the first two cases the Imperial Ottoman Bank were not to pay over to the commissioners the amount of income tax they had deducted on paying the dividend, and in the last case they were?

It was said that it would be difficult to ascertain what proportion of the 98,322*l.* 10*s.* would represent profits made out of the United Kingdom, but if it cannot be ascertained absolutely it may be arrived at proximately by the process suggested in paragraph 37 of the case, or by some other method.

It follows that the assessments of the commissioners in paragraphs 35 and 37 of the case cannot be supported. The case must go back to them to make the assessment on the total amount of the profits made in the United Kingdom on an average of three years, that is 81,477*l.* 4*s.* 8*d.*, plus the amount of so much of the 98,322*l.* 10*s.*, as can be ascertained to be profits made out of the United Kingdom in 1874–75.

The principle of the first case rule 1 of 5 & 6 Vict. c. 35, s. 100, not being applicable, as neither party has established the position contended for, I think there should be no costs.

If the Imperial Ottoman Bank on demand refuse or neglect to furnish the necessary information to the commissioners to enable them to assess the amount of foreign made profits in the English paid dividends, it may be that the commissioners would be justified in assessing the Ottoman Bank to the full amount of the English paid dividend, leaving them to prove on what amount they have already paid income tax as profits earned in the United Kingdom.

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POLLOCK, B. The question which arises in this case is, in respect of what funds coming to the hands of the London agency of the Imperial Ottoman Bank are they properly assessable to income tax?

The bank is a corporation established as a Societé Anonyme under a government concession at Constantinople, and having branches or agencies at Paris and London, business being carried on, and profits at times being made in all three places.

The capital of the bank is divided into shares of 20*l.* each. The certificates of shares are made out to bearer and the shares themselves are transferable by delivery of the certificate. The dividends thereon are payable at the option of the holders at Constantinople, Paris, or London by means of coupons attached to the certificate. At the end of each year the accounts are submitted to a general meeting, who fix the amount of the annual dividend. The nett proceeds, after deducting all expenses, constitute the profits, and out of these there is deducted 10 per cent. for reserve fund and 5 per cent. on the share capital for dividend on account. The surplus, after paying one-tenth to the founders and members of the committee and council is distributed as dividend to the shareholders.

The London agency act as agents for the bank in the United Kingdom, and pay to any coupon holders who may produce them at the London office the amounts to which from time to time they may be entitled by way of dividend.

The bank admit that they are liable to be assessed for income tax under 16 & 17 Vict. c. 34, s. 2, schedule D, in respect of all money coming to the hands of the London branch which arises from profits earned within the United Kingdom.

They also admit that whenever the amount earned by such profits is insufficient to pay the dividends payable in the United Kingdom, and money is transmitted from abroad to pay so much of the dividends as cannot be paid out of such profits, they are liable to be assessed in respect of such money by virtue of s. 10 of the above Act; and as to both of these income tax has, in previous years, been assessed and paid. The Income Tax Commissioners, however, make a further claim, and assert that although the amount paid by way of dividend in the United Kingdom should

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not in any one year exceed the amount of profit earned in the United Kingdom, the bank are liable to income tax in respect of so much of the amount paid in the United Kingdom by way of dividend as consists of profits earned abroad.

The mode in which the commissioners have sought to assess the London agency in respect of this sum is twofold.

By one assessment the commissioners treated all the shareholders as persons, some of whom reside in the United Kingdom and some elsewhere, carrying on a concern jointly in the United Kingdom and elsewhere; and as to those who reside in the United Kingdom the commissioners claim to tax them in respect of their share of the entire profits, whether earned in the United Kingdom or elsewhere.

By an alternative assessment the commissioners treated the London branch or agents as persons in the United Kingdom intrusted with dividends payable out of the funds of a foreign company, and as such liable to income tax in respect of all dividends in the United Kingdom, and also as persons liable to income tax in respect of all profits made in the United Kingdom, but, to the extent that the amount paid by way of dividend consisted of profits earned in the United Kingdom, the commissioners admitted that this amount, having been taxed once as profits, was not further liable. In the result, therefore, the commissioners by this assessment claim to tax, first, all profits made in the United Kingdom, and, secondly, so much of the amount paid for dividends in the United Kingdom as consists of profits earned elsewhere.

The first of these two assessments appears to me to be wrong in principle for these reasons. The bank is a foreign corporation whose chief place of business is at Constantinople and, as has already been decided by *Attorney General* v. *Alexander* (1), the London branch or agency cannot be treated as a person residing in the United Kingdom. The bank itself is a corporation, and although a foreign corporation its constitution as such should be respected and recognized by the legal tribunals of this country. It results from this that the shareholders, although they receive in the shape of dividends that which is derived from the profits of

(1) Law Rep. 10 Ex. 20.

the bank, are not partners and cannot be treated as such. In other words their right under the constitution of the corporation is to a dividend, but they have beyond this no interest in the general funds of the bank.

With respect to the alternative assessment the English agents are in my opinion properly assessed, and for these reasons; according to the literal construction of the statute the profits which have been earned in the United Kingdom and are in the hands of the English agents to be distributed among the shareholders in the United Kingdom by the payment of dividends, come within the incidence of both branches of the statute. First, they are annual profits arising from a trade exercised within the United Kingdom within the second branch of schedule D, and are properly assessable as such under s. 100. Secondly, with respect to all money in the hands of the London agents applicable to the payment of dividend to the shareholders within the United Kingdom they are intrusted therewith for payment to persons in the United Kingdom within the meaning of s. 10, whether such money arises from profits earned in England or elsewhere; the language of the section being "intrusted to" not "transmitted to," and so the London agents are assessable under the provisions of s. 10, and unless there be good reason to the contrary they must pay income tax upon the whole amount.

If, however, they can shew that they have already paid income tax upon the amount in whole or in part, they are entitled to do so, inasmuch as it would be clearly unjust that they should pay twice over. Then arises the question which appears to me to give rise to the entire difficulty in this case. In respect of what portion have they paid twice over, or have they so paid in respect of the whole? Now it is quite clear that the dividends which are payable alike to all the shareholders whether resident within the United Kingdom or not may, and probably do accrue from profits earned within the United Kingdom and also from profits earned without the United Kingdom, and this is not in any way disturbed or affected by the fact that the directors choose to pay such dividends out of any particular moneys as moneys earned in Constantinople, Paris, or London. Hence the London agents, by paying tax upon the profits made in the United Kingdom are

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entitled to have the tax payable upon the dividends reduced only in respect of so much of those dividends as arose from profits earned in the United Kingdom.

If all the money applicable to dividends paid within the United Kingdom was in any year earned within the United Kingdom only, then the profits earned within the United Kingdom would represent in all respects the same sum, and the agents having paid upon it as profits, ought not to pay upon it again as money intrusted to them to pay dividends. If, however, a portion only was earned within the United Kingdom then they can claim to deduct in respect of that portion only; otherwise no income tax would be paid upon that portion of the money intrusted to the agents for payment of dividends which was earned abroad.

In the result the first assessment cannot be supported. The second is correct, but the bank by a proper return may escape its effect to the extent I have indicated.

Under these circumstances there should be no order as to costs.

KELLY, C.B. I am of opinion that the appellants are entitled to the judgment of the Court, on the ground that the assessment made and sought to be enforced by the Crown upon the bank is a claim at once to income tax on the year's profits of a body of traders, and then to income tax again upon their year's income, in which the fact is lost sight of by the Crown that the profits of a trader constitute his income, and are in fact his income, and that profits and income are one and the same thing, and that the assessment by the Crown upon the bank in this case is as if a banker, or merchant, or shopkeeper, who had earned 1000*l.* as profits in a given year by his trade, and which in fact constituted his whole and sole income and means of subsistence, were to be made to pay the income tax, first upon the 1000*l.*, the profits earned within the year, and then over again upon the same 1000*l.*, as his income when he should proceed to appropriate and expend it in the maintenance of his family; which, simply stated, would be to make a trader who made a 1000*l.* a year, and had no other income, to pay the income tax upon it twice over, and so in the year in question to pay fourpence in the pound instead of twopence for income tax.

This was attempted by the Crown for the first time in 1874–75, the true principle having been acted upon, alike by the Crown and the bank, from 1863 until the year 1874–75, of assessing to the income tax the profits earned in England, but once, and once only; and when the amount so earned was insufficient to meet the payment of the coupons, which constituted the dividends for the year in question, it was necessary to require a further sum to be intrusted to the agency from abroad, and application for it was made, and it was remitted from Constantinople accordingly, and so intrusted to the agency within the statute; and of this sum a return was made, and income tax paid upon it under s. 10 of the Act. No claim was made, as now, to tax the bank in respect of the act of payment of the coupons, nor (except in *Alexander's Case* (1), hereafter noticed), to tax any other sum than the amount of the earnings in England, and the amount intrusted, if any, and remitted from Constantinople, under the statute. The real facts of the case, when correctly stated and attentively considered, together with the legislative provisions alone applicable to the questions which are raised, will be found to demonstrate these propositions; especially when the case can be presented or illustrated in a form divested of intricate arithmetical calculations, and unmanageable figures.

But, first, as to the facts as they appear in the printed case. The Ottoman Bank is a large body of shareholders (whether corporate or incorporate is immaterial), carrying on its business at Constantinople, in Paris, and in London. One portion of its shareholders reside in Turkey, another in France, and another in England. The accounts of the bank are taken at the end of December in each year, and the amount of dividends to be paid in the shape of coupons is ascertained by the 5th of April in the following year, and the assessment to the income tax in relation to the year in question, 1874–75, is made when these figures are ascertained, after the 5th of April, in the year 1875. The accounts of the bank having been taken at the end of December in each year, and the profits made in each of the three countries being ascertained, a dividend is declared, which, after certain deductions, is paid to the shareholders in the three

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countries upon the presentation of coupons, which coupons are annexed to the shares, and are therefore in the hands of the shareholders. No payment of money actually takes place, except upon the presentation of the coupons, but the amount of the dividend declared is published in the three countries; and this amount determines the value of each coupon. The coupons, which are payable half-yearly, that is, two coupons for each year, are annexed to each share, and they are made payable at the offices of the bank in the three cities of Constantinople, Paris, and London.

In the year in question, 1874–75, the amount of profits actually earned in England was 145,539*l.* 0*s.* 2*d.* The sum under the regulations and practice of the commissioners, in respect of which the bank was assessed, and being the average of the profits earned during the next preceding three years, was 81,477*l.* 14*s.* 8*d.* The amount paid upon the presentation of coupons, and treated as paid for dividends, to which English shareholders were entitled, was 98,322*l.* 10*s.* These sums were returned to the commissioners by the bank or their representatives here, and were, in my opinion, all that they were called upon to return as material to the case, or that in fact it was possible for them to return. The bank have, however, at my instance, through their solicitors, furnished certain further information (1) which has also been laid before the commissioners, and is strictly correct; and we now know that the entire aggregate of profits made in the three countries during the year in question was 848,125*l.* 12*s.* 7*d.* It follows, therefore, that the sum already specified, having been earned in England, that 702,586*l.* 12*s.* 5*d.* was earned abroad; that is, at Constantinople and in Paris together.

The provisions of the Acts of Parliament applicable to the case are, first, the second clause in Schedule D. of the 16 & 17 Vict. c. 34, s. 2, which imposes the income tax upon the annual profits or gains arising or accruing to any person (or corporate body) although not resident in the United Kingdom, from any trade exercised within the United Kingdom. Under this provision the bank have been assessed upon the sum of 81,477*l.* 14*s.* 8*d.*, which the commissioners themselves have substituted, as the

(1) Containing an account of the actual profits and dividends for several years.

average of the next preceding three years for the sum actually earned of 145,539*l.* 0*s.* 2*d.*, and this assessment has been acquiesced in and paid by the bank to the Crown. And as the sum of 98,322*l.* 10*s.* was the amount paid to the holders of coupons, upon their presentation, that sum has been also returned; and inasmuch as the amount of profits earned in England, and in the hands of the bank here, was sufficient to meet and to pay this sum, no further sum has been required to be supplied or was supplied from Constantinople, and so "intrusted" to the bank here under the 16 & 17 Vict. c. 34, s. 10; and I am of opinion, therefore, that the liability of the bank to income tax is at an end.

Some complexity is occasioned by its appearing that 98,322*l.* 10*s.* has been provided for by the smaller sum of 81,477*l.* 14*s.* 8*d.*; but, as this arises from the mode of assessment of the profits adopted by the commissioners themselves, I am not aware that any question was raised on this point during the argument. Reference has been made to s. 100 of 5 & 6 Vict. c. 35; but it must be remembered throughout this case, that this is not an assessment of the shareholders resident in England upon the amount of their respective incomes as shareholders in the bank, but is an assessment upon the bank itself, in respect of the specific sum of 81,477*l.* 14*s.* 8*d.*, assumed by the Crown to be the amount of the profits earned in England; and upon what ground that amount of profits, having been assessed to and paid the income tax, a new and additional assessment can be made upon the 98,322*l.* 10*s.*, to the payment of which the profits of the year have been applied, I am at a loss to understand; this, as already observed, being an assessment to the income tax, not upon profits, nor upon the income derived from the profits, but upon the mere act of payment of the income to those who are entitled to it.

Then it is said that this money, 81,477*l.* 14*s.* 8*d.*, is money "intrusted" to the bank, under the 16 & 17 Vict. c. 34, s. 10; but, in the first place, it must be remembered that the amount of profits earned in England is not, in fact, a large specific sum, which might consist of bank notes, or of gold lying upon a table, but is the result of almost innumerable operations, by which very small, as well as large, sums are realised as profits during an entire year,

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from 1*l.* to 1000*l.* and upwards, realised day by day and hour by hour in the bank. And if it could be said that each and every of these sums is money "intrusted" to the bank under the Act referred to, the same might be said of every sum of any and every amount which comes into the hands of the bank in the course of the year, and which sums, great and small, are applied to all imaginable purposes, such as the payment of clerks and servants, the payment of the rent of offices, the insurance of their property, and all other purposes incidental to the business of a bank. How can a sum of 50*l.*, which has come into the hands of the bank in London in the ordinary course of their dealings, and which is applied in the payment to one of their clerks of half a year's salary, which is as much "intrusted" to the bank as the sums daily arising to them from profits upon their transactions, be seriously argued to be money "intrusted" to them under and according to the provisions of this s. 10 of the Act of Parliament? I know of no other form in which the proposition contended for on the part of the Crown can be stated than to insist that upon a true construction of the Act of Parliament the sum earned as profits within the year, and applied to the payment of dividends, is impressed with a double character, and may be assessed to the income tax, first, as profits earned in England, and next, as money intrusted to the bank under the statute. I can only repeat that in my view of the case, if this be so, every shilling that they receive in England, and at whatever time, and for whatever purpose, or to whatever purposes it may be applied, is "intrusted" to the agency in London by the bank itself, and within the meaning of the statute. The Attorney General, in his ingenious argument, suggested, and indeed contended, that the profits received by a shareholder, and constituting the whole or a part of his income, are liable to assessment, whether such profits were earned in England or abroad. And it is certainly, in one sense, true, not that any Act of Parliament makes the profits earned by this bank abroad liable to assessment to the income tax, the contrary having been decided by this Court in the case of *Attorney General* v. *Alexander* (1), so often referred to, but there can be no doubt that every dividend upon every share in the

(1) Law Rep. 10 Ex. 20.

bank to which the shareholder is entitled consists of profits earned abroad, as well as profits earned in England, and if this were an assessment upon a shareholder, upon his income derived from his shares in the bank, he would no doubt be liable to the assessment, and in that sense would be liable to the tax, as well upon the profits earned abroad as upon the profits earned in England, of which his dividend should be composed. But the Government of this country has thought fit, by means of legislation, convenient and advantageous to itself, to abstain from taxation in respect of the income tax of shareholders in a foreign bank resident in this country by a direct assessment made upon the shareholders themselves, and has substituted a liability to the income tax upon any agents or representatives of a foreign bank here who are "intrusted," under the provisions of s. 10, so often referred to, with the money of the bank, for the purpose of paying the dividends, in respect of which shareholders resident in England would themselves have been liable to assessment. We have, therefore, to consider whether, where the amount of profits earned by a foreign bank in England within a year has been assessed to, and has paid, the income tax; and that same sum of money has been found sufficient to pay the dividends, or the coupons, supposed to represent the dividends, to which English shareholders are entitled, that same sum of money is liable to be assessed and to pay the income tax over again, upon its application to the payment of the coupons assumed to represent the dividends of the English shareholders, on the ground that it is "intrusted" to the agency here under the statute, the 16 & 17 Vict. c. 34. For this there is no warrant in any of the statutes. As profits earned in England, the amount has already been assessed and the income tax paid to the Crown, and no money whatever has been "intrusted" to the agency under the statute, 16 & 17 Vict. c. 34, s. 10.

The two provisions applicable to this case, and under which alone the bank can be assessed to the income tax, are, first, the clauses in schedule D, to which reference has already been made, and then, where it is brought into operation, the 16 & 17 Vict. c. 34, s. 10. The effect of that statute which is most useful and beneficial to the government here, is simply this, that where, in

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order to satisfy the claims to an income consisting of dividends upon the shares or stock of a foreign corporation, it is necessary to remit money to England, then that, instead of remittances by the corporation abroad to the shareholders in this country and an assessment to the income tax upon such shareholders, the foreign corporation may remit the aggregate amount of the dividends to which such shareholders would be entitled to an agency or a branch bank in this country, and assess them to the amount so remitted, leaving it to them to pay the English shareholders, deducting the amount of the income tax which shall have been paid by the branch bank, or agents, to the Crown; and this is called an intrusting by the bank to the agency of the amount so remitted. And in every year from the year 1863, when the bank was established, to 1874–75, the amount of profits earned in England has been found insufficient to pay the amount of dividends which had already, before the 5th of April, been paid by the agency to the English shareholders upon the presentation of their coupons, the amount deficient has been required from the bank abroad, and has been remitted from Constantinople, and so intrusted to the agency within the statute, and the income tax has been paid upon it by the branch bank or agency here, in strict accordance with the provisions of this Act. Both statutes have therefore been complied with from 1863 to the year in question, 1874–75; the provisions of the Act in schedule D, and the provisions of 16 & 17 Vict. c. 34, s. 10, in respect of the amount required and remitted from abroad. In the year in question, 1874–75, the sum earned as profits by the bank in England, being 145,539*l.* 0*s.* 2*d.* (for which the commissioners have substituted 81,477*l.* 14*s.* 8*d.*), and that sum being actually in hand and, more than sufficient to pay the 98,322*l.* 10*s.*, the dividends due to and claimed by the English shareholders upon their coupons, no money whatsoever has been required to be remitted or has been remitted from abroad; and so there is no other sum in existence, upon the facts of the case, upon which the bank could have been or can be, assessed to the income tax, and I in vain called upon the learned counsel for the commissioners to point out what enactment, in any Act of Parliament, authorized or empowered the commissioners to assess the Ottoman Bank, upon any other

than these specified sums in respect of which they have been assessed and have paid the tax.

In like manner, I called upon the learned counsel for the commissioners, to point out and specify what returns the bank could be called upon to make which they have not made, and which it was possible for them to make. They have returned the amount of profits earned in England and the amount which they have been called upon to pay and have paid upon the presentation of the coupons, representing or assumed to represent, the dividends of the English shareholders. They have indeed added the amount earned by the bank at Constantinople, and in Paris, though I do not see what bearing that amount has upon any question in this appeal. It is clear upon these facts that the Ottoman Bank has been assessed to and has paid the income tax upon the whole of that portion of its profits which has been earned in England: and, as decided in this Court in the case of *Attorney General* v. *Alexander* (1) the bank is not liable to assessment upon any portion of the profits earned abroad. It has therefore, satisfied the provisions of the Act in schedule D, and in the year in question, unlike what was found to be necessary in former years, the London agency have not needed the aid of the establishment at Constantinople or in Paris to meet the dividends which they have been called upon to pay, and have paid to the English shareholders, and so have not brought the 16 & 17 Vict. c. 34, s. 10, into operation at all.

In order to avoid the intricate calculations which have been resorted to by the learned counsel for the commissioners, and the large figures so inconvenient to deal with, which appear in the real statement of the case, I would suggest a more convenient form in which every question in the case may be dealt with. Suppose the bank to have made in the year in question, in the three countries, a profit of 500,000*l.*; 100,000*l.* in England and 400,000*l.* abroad, of which 200,000*l.* have been made in Constantinople, and 200,000*l.* in Paris. Suppose the English shareholders be entitled altogether to dividends, to be paid to them upon the presentation of coupons, to amount to 100,000*l.*; the Paris shareholders, in like manner, to 200,000*l.*; and the Constantinople

(1) Law Rep. 10 Ex. 20.

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shareholders to the remaining 200,000*l.* The bank has, therefore, 500,000*l.* of profits in its hands; of which 100,000*l.*, which has been earned in England, is in the hands of the agency in England, and the remaining 200,000*l* and 200,000*l.* at Constantinople and in Paris respectively. In respect of what sum or sums of money is the bank liable, under the two statutes referred to, to be assessed to the income tax? 100,000*l.* having been earned in England they are to be assessed to the income tax upon that sum. Upon the 400,000*l.* earned abroad they are liable to no assessment whatsoever. If with the 100,000*l.* in their hands in England they pay to the English shareholders the dividends or coupons to the amount of the 100,000*l.* to which the shareholders are entitled, deducting the income tax, and they pay to the shareholders at Paris the 200,000*l.* and the shareholders at Constantinople the remaining 200,000*l.*, without deduction, they have thus disposed of the whole of the 500,000*l.*, the entire aggregate of their year's profits; and by virtue of what provision in any Act of Parliament can the bank be assessed in respect of any other sum whatever? The case may be put in every variety of form, and upon every variety of possible facts that can be supposed; and the result will be found, that, unless a trader, or a body of traders, like the Ottoman Bank, can be made to pay income tax first upon the profits of their trade, and afterwards upon the incomes of their shareholders, which incomes are derived from their profits, and are, in fact, their profits upon the division of such profits among those who are entitled to them, and which shares of the aggregate profits to which they are entitled, constitute, and are in fact, their incomes, no assessment can be made under any imaginable state of things that can be suggested, beyond a single assessment upon the profits which the trader has earned.

Suppose from some political disturbance in Turkey and France, or from any other cause, the whole profits of 500,000*l.* to have been earned in England, and the whole of the shareholders in the bank to have quitted the Continent and to be resident in England; the bank is assessed upon the amount of profits, and pays the income tax of 2*d.* in the pound upon 500,000*l.* The sum is then divided among the shareholders, and constitutes their incomes, and if, as I hold to be the law, profits and income con-

sisting of those profits, are one and the same thing, the trader can be taxed but once upon the sum thus earned, being his year's income.

But, before proceeding further, to put the question in the clearest and simplest form, suppose a firm of bankers, consisting of two partners, had earned profits in their business to the amount of 10,000*l.* within the year, which profits in their business were their only incomes or sources of subsistence, and they return as the amount of their year's profits or incomes this sum of 10,000*l.*, and are assessed to the income tax upon that amount, and pay the tax accordingly. They then proceed to divide the money, each partner taking 5000*l.* of it, and expend it in the course of the year upon the maintenance of himself and his family. Could these two individuals be assessed over again, each to the sum of 5000*l.*, upon their having divided it between them, and proceeding to appropriate and expend it? For if so, if the income tax were, as in 1875, 2*d.* in the pound, they would have to pay to the Crown, not 2*d.*, but 4*d.* in the pound upon their income; and this additional tax would in reality be imposed, not upon the year's income derived from the profits of a trade, but upon the mere act of receiving and appropriating such profits, quod absurdum est.

Suppose, next, the case first put, and which, except as to the amounts of the figures, is identical with the case now before the Court, of the bank possessing 500,000*l.* which has been earned for profits; of which 100,000*l.* having been earned in England, is in England, and the shareholders in England being entitled to 100,000*l.* in respect of dividends or coupons, the 100,000*l.* in their hands, and on the spot, is paid to the English shareholders; and the 200,000*l.* in Paris, to the shareholders in Paris; and the remaining 200,000*l.* to the Turkish shareholders in Constantinople. Can it be contended that the bank is liable to pay the income tax upon either of these two latter sums of 200,000*l.*?

In such a case the Ottoman Bank would have in its hands 500,000*l.*, the aggregate amount of its profits in the three countries within the year. Of this, 100,000*l.* having been earned in England, would be here, in London; and 200,000*l.* having been earned in Paris, would be in Paris; and the remaining 200,000*l.*,

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having been earned in Turkey, would be at Constantinople. The bank would accordingly pay the 100,000*l.*, which they have here, to the English shareholders who are here; the 200,000*l.* which they have at Paris they would pay to the shareholders in Paris; and the 200,000*l.* which they have at Constantinople would be paid to the Turkish shareholders at Constantinople. Is it possible seriously to contend that any law or statute in England would compel the bank to divide 100,000*l.*, which they have here, into five parts, and remit two fifth parts to Paris, and two fifth parts to Constantinople; and also to divide the 200,000*l.* which they have in Paris into five parts, and remit one fifth part to England and two fifth parts to Constantinople; and again to divide the 200,000*l.* at Constantinople into five parts, and remit one fifth part to London, and two fifth parts to Paris; and retain the remaining two fifth parts at Constantinople; instead of paying the 100,000*l.* which they have in England to the shareholders there, and the 200,000*l.* which they have in Paris, and the 200,000*l.* at Constantinople, to their shareholders in those two cities respectively? Yet this is the course which they would be bound to adopt, if the calculation and application of those different sums, suggested in the arguments for the Crown, were to be practically adopted.

As to the claim to have certain other returns made; as we have already before us the several sums before referred to, which are all that are known, or can be known to the Ottoman Bank or its agents in England, or elsewhere, there remains but the number of shareholders, and the precise amount of the dividends to which they are entitled, that can be suggested on the part of the Crown. As to the shareholders, I have already pointed out that the number is unknown, and unascertainable. No register is kept, and their number, the shares being transferable by delivery from hand to hand, may, as already observed, vary from day to day, and hour to hour. And as to the amount of dividends to which the English shareholders, or any others, may be entitled, inasmuch as the coupons are also transferable by delivery and may pass from hand to hand at any moment, and in either of the three countries, it is only upon their being presented and paid that the bank or their agents can know or ascertain their amount as presented in

each of the three cities; and even then they know not to whom they belong. The practice adopted by the bank, and indeed forced upon them by the commissioners, is to take the amount of the coupons, paid by the agency in England, to be the amount of the dividends to which the English shareholders are entitled; but it is obvious that as many of these coupons may have been brought or remitted to England by foreign shareholders to whom they belonged, a considerable sum may have been paid, within any given year, to persons not English shareholders, and who, therefore, are not liable to income tax.

The ingenious suggestion and calculation of the Attorney General, to the effect that the English shareholders are liable to pay the tax upon profits made abroad, as constituting a portion of their dividends, really comes to this:—Every single dividend upon every share is really composed of profits earned in the three countries. If the English shareholders were assessed on their respective incomes here, no doubt they would be liable to the income tax wherever the different portions of the amounts had been earned. But the assessment here is on the bank; and the bank is liable only to the income tax upon the profits earned in England, and upon the money remitted to them from abroad for the payment of their dividends to the English shareholders under the 16 & 17 Vict. c. 34, s. 10; and to no other assessment whatsoever.

By adopting the convenient figures which I have suggested, of 500,000*l.* of profits, every possible case which can occur may be tested upon the true principles of assessment; whether, by supposing the whole of the profits earned in England, and the whole of the shareholders to be resident in England; or the whole of the profits made abroad, and the whole of the shareholders resident abroad; or a portion of the profits earned in England, and the remaining portions abroad. And, in each and every case, by the application of the English statutes, the extent and the amount of the assessments to income tax upon a bank may be ascertained.

But, finally, to take the real sums appearing upon the case (however inconvenient may be the figures to be dealt with), the sum earned in England in the year in question is 145,539*l.* 0*s.* 2*d.* But for this must be substituted, as required by the commissioners,

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upon the three years' average principle, 81,477*l.* 14*s.* 8*d.* Upon this the income tax of 2*d.* in the pound is 678*l.* 19*s.* 7*d.*; and this sum has been assessed upon the appellants, and paid by them to the Crown. The sum paid to the English shareholders, or such as are assumed to be English shareholders, upon the coupons presented to the bank in the year in question, is 98,322*l.* 10*s.* But this sum has been paid out of the profits actually earned in England, and upon which the income tax has been assessed and paid, though claimed by the commissioners upon the minor amount only of 81,477*l.* 14*s.* 4*d.* Unless, therefore, contrary to the practice adopted and acted upon from the year 1863 until the year in question, 1874–75, the Crown is now entitled to claim income tax, at once, upon profits earned, and upon the income consisting of such profits; in other words, unless traders in England, are liable to the income tax upon the profits which they earned within the year, and again, upon the income which, in fact, is the profits thus earned, the trader possessing no other income, it is impossible, for the reason assigned, for the Crown to maintain its claim to income tax upon the 145,539*l.* 0*s.* 2*d.*, or, as substituted for it by the commissioners, upon 81,477*l.* 14*s.* 8*d.*, and also upon the sum of 98,322*l.* 10*s.*, which constitutes the incomes of the whole body of English shareholders, and which is paid to them as representing their shares of the whole profits of the bank, or the proportion to which they are entitled of the sum of 848,125*l.* 12*s.* 7*d.* Of this sum, which constituted the aggregate profits made by the bank in the three countries within the year in question, the bank, by its representatives of this country, having here upon the spot a sum sufficient to pay this amount to the shareholders, have paid it accordingly. Unless the fanciful, and I venture to think the absurd course were adopted, of remitting to Paris and Constantinople the proportions of this sum of 145,539*l.* 0*s.* 2*d.*, to which the foreign shareholders were entitled, and then requiring the bank abroad to remit back again to them the proportion of profits made abroad, which in that case would belong to the English shareholders, the case in fact is simply this, that out of the aggregate profits earned by the bank they have paid to the shareholders, as represented by the appellants, that portion of the aggregate profits which the bank had

in its possession here in England in satisfaction of the dividends claimed by the English shareholders, and to the foreign shareholders the proportion of the entire profits to which they were entitled. I quite agree that it is not competent to the Ottoman Bank by any mode in which they may think fit to carry on their business to defeat or to evade the claim to any income tax to which the Crown is entitled. But the British Government having thought fit to relieve itself from the inconvenient task of assessing an indefinite number of English shareholders, whose numbers are unknown, and whose residence may be likewise unknown, to the income tax, to which they are liable upon their respective incomes, is itself bound, as well as the Ottoman Bank, to resort to the Act of Parliament which the government itself has framed and passed, for assessing the bank in lieu of the shareholders under the provisions of that Act to whatever amount of money may have been intrusted to them, within and according to those provisions for the purpose of paying those incomes to the shareholders. And, as already observed, there are now no other provisions of any Act or Acts of Parliament in existence under which the Ottomon Bank can be lawfully assessed to the income tax than the 2nd clause in schedule D, and the 10th section of 16 & 17 Vict. c. 34. And although it is true that there is no such word in the latter statute as "remitted," it is perfectly clear that the agency of the bank in England can obtain the sum of money in respect of which they are to be assessed instead of the shareholders in no other way than according to the precise terms to be found in the statute, and which is a remittance from abroad of the sum required when the amount of profits earned in England, and already in their hands, is insufficient for that purpose. Were it otherwise, and if the bank could be assessed in respect of any other sum than that which is intrusted to them from abroad by virtue of that statute, it could only be for the 98,322*l.* 10*s.*, which will have been paid to those assumed to be the English shareholders: and as that sum is income, and income only, and the profits with which it has been paid are profits earned in England, and the only profits in the hands of the Ottoman Bank liable to income tax, unless profits and income, which consists of profits, can be taxed twice over, which, for the reasons assigned, I

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hold that they cannot, the Ottoman Bank is not liable to this double taxation. As to the demand of 115,835*l.*, and then of 197,412*l.* 14*s.* 8*d.*, I must leave it to the advisers of the Crown, with the assistance of the judgments of my learned brethren, as they best can, to specify the amounts of these sums, and how they are made up, and the grounds upon which by any law or statute of England they are made liable to the income tax.

Finally, I am of opinion that the judgment in this case should be entered, mutatis mutandis, for the appellant, in the terms of the judgment entered in the case of *Attorney General* v. *Alexander* (1) as follows:—

"That the London agency of the Imperial Ottoman Bank (such agency being represented by the appellant), is only bound to make a return under the 5 & 6 Vict. c. 35, in respect of the profits made in the United Kingdom; and, inasmuch as no profits made abroad have been actually remitted to this country for distribution in London under 16 & 17 Vict. c. 34, s. 10, no further returns are required to be made, and the appellant is liable to no further or other assessment to the income tax, and that judgment be thereupon entered for the appellant, with costs of suit."

Case remitted. (2)

Solicitor for appellant: *G. M. Clements.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) Law Rep. 10 Ex. 20.

(2) The order drawn up, after reciting that a case had been stated and argued, continued:—"The Court are of opinion that the decision of the commissioners for special purposes of the income tax on confirming the assessment on dividends made upon the committee of the Imperial Ottoman Bank for the year 1874, ending the 5th of April, 1875, is based upon the right principle of assessing, in so far as it assesses so much of the profits of the bank intrusted to the committee for payment of dividends in the United Kingdom as is not shewn by a proper return on the part of the bank to arise from profits made in the United Kingdom, and do order the case to be remitted to the commissioners to be dealt with by them on the above stated principle, and do further order that no costs be paid on either side."

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Practice—Action on Replevin Bond—Judgment for want of Statement of Defence—Order XXIX., rules 2, 4.

If, in an action on a replevin bond, the plaintiff, instead of claiming damages, claims the amount for which the bond is given, and becomes entitled to judgment by default, his proper course is to enter final judgment under Order XXIX., rule 2, and not interlocutory judgment under rule 4 of that order.

MOTION on appeal against an order of a judge at chambers refusing to set aside the judgment signed by the plaintiff.

The writ of summons was indorsed, "The plaintiff's claim is 102*l.* 8*s.* upon a bond to secure payment of 150*l.* and interest." The statement of claim alleged that the plaintiff had distrained certain goods and chattels in the Red Lion Inn, Hanley, and that one Sarah Mansfield claimed them, and that thereupon the defendants, by their bond, became bound to the plaintiff in the sum of 150*l.*, subject to the condition that the bond should be void if Sarah Mansfield prosecuted an action without delay and with effect against the plaintiff for taking the goods; that Sarah Mansfield did not prosecute the action of replevin with effect and without delay, and that the defendants had not performed the condition of their bond, and that the plaintiff had been delayed and hindered and defeated in obtaining payment of the sum for which the distress was levied, and had incurred costs and damages, and was entitled to recover the sum secured by the bond. The plaintiff claimed 150*l.*

The defendants appeared, but put in no statement of defence, whereupon the plaintiff signed interlocutory judgment and obtained an order from the district registrar of Hanley (where the action was commenced) that a writ of inquiry should issue to the sheriff of Staffordshire to assess the damages. The defendants took out a summons before the district registrar to set aside this judgment for irregularity, on the ground that the action was brought to recover a debt or liquidated demand, and that the judgment should have been final under Order XXIX., rule 2. The district registrar dismissed this summons, and on appeal his decision was affirmed by a judge at chambers.

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C. Dodd, for the defendants. Before the Judicature Acts it was not the practice to have a writ of inquiry on bail or replevin bonds, but to enter final judgment. The stat. 8 & 9 Wm. 3, c. 11, did not apply, because the courts of law could afford relief: *Middleton* v. *Bryan*. (1) The Judicature Acts and orders have not altered this, and the action is still for a debt or liquidated demand, and therefore within Order XXIX., rule 2. The defendants are obliged to apply to set aside the judgment, as otherwise they would become liable for the costs of the writ of inquiry.

A. E. Hardy, for the plaintiff. Under 11 Geo. 2, c. 19, s. 23, the value of the goods was ascertained, and the bond was in double such value, but under 19 & 20 Vict. c. 108, s. 65, this is not the case. There is then a substantial difference, for before the latter statute the claim being ascertained could be treated as a liquidated demand. At any rate, the former practice is superseded by Order XXIX., rules 2 and 4, and the amount to which the plaintiff is entitled must be ascertained by a writ of inquiry.

C. Dodd was not heard in reply.

LUSH, J. I am of opinion that the application by the defendants ought to succeed, on the ground that the writ of inquiry was not necessary or authorized. Before the passing of the Judicature Acts it is clear that there would have been no writ of inquiry. If the plaintiff claimed the whole amount of the bond, the proper course for the defendant was to apply to the Court for a stay of proceedings on payment of the amount really due and costs, and if there was any dispute as to what that amount was, it would be referred to a master to ascertain. I think this is not altered by the Judicature Acts and Orders. The plaintiff has the option of claiming the specific amount of the bond or damages. If he takes the former course, that is a demand of a liquidated amount, if the latter, then he must proceed under Order XXIX., rule 4. The forms given in Appendix D. to the Judicature Act, 1875, of judgments in default of appearance and defence, mark the difference between the case of a liquidated demand where the judgment is final, and the case where final judgment is entered only after

(1) 3 M. & S. 155.

assessment of damages. The former was the case here, and the plaintiff was entitled to sign final judgment, which he is at liberty to do now, but the interlocutory judgment and all subsequent proceedings must be set aside. The defendants are entitled to the costs of all the applications they have made.

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POLLOCK, B., concurred.

Solicitors for plaintiff: *Gregory, Rowcliffe, & Co., for J. L. Hamshaw, Hanley.*

Solicitors for defendants: *Pitman & Lane, for E. A. Ashmall, Hanley.*

[IN THE COURT OF APPEAL.]

1879 *Dec.* 19.

JONES, APPELLANT; THE CWMORTHEN SLATE COMPANY, LIMITED, RESPONDENTS.

Revenue—Income Tax—Slate Quarry, Assessment of—5 & 6 *Vict. c.* 35, *s.* 60, *Sched. A, No.* 3.

Slate was obtained from the side of a hill by underground workings carried on through levels:—

Held, affirming the judgment of the Exchequer Division, that the works were to be assessed as a quarry under rule 1 of No. 3 of Sched. A of 5 & 6 Vict. c. 35, s. 60, and not as a mine under rule 2 of that enactment.

APPEAL from the judgment of the Exchequer Division in favour of the appellant on a case stated by Commissioners of Income Tax pursuant to 37 & 38 Vict. c. 16, pt. 3.

The respondents were possessed of certain works for getting slate. The works were originally open, but for some years the slate had been got out by driving levels into the side of a hill, and the workings were carried on entirely underground. The respondents were assessed as the owners of a quarry, but the commissioners decided that the workings were a mine. Their decision was overruled in the Exchequer Division. (1)

1879. Dec. 18. *A. L. Smith*, for the respondents. The mode of getting the slate makes these works a mine, for it is carried on underground. The term quarry is properly applied to open workings, and the words of the statute must be read in their

(1) 4 Ex. D. 97.

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ordinary signification. Rule 1 of No. 3 of 5 & 6 Vict. c. 35, s. 60, Sched. A, refers to quarries, and rule 2 to mines. As the workings are in popular language mines, they ought to be assessed under the latter enactment. Turner, L.J., in *Bell* v. *Wilson* (1), defines the meaning of the word "quarry," and his definition does not apply here.

Sir H. Giffard, S.G., and *A. V. Dicey*, for the appellant. The question is not what the words "quarry" or "mine" mean in their popular sense, or what they mean in a conveyance, as in *Bell* v. *Wilson* (2), but what is the meaning of these words in this statute. The words of rule 2 are, "mines of coal, tin, lead, copper, mundic, iron, and other mines," but the words "other mines" must be construed ejusdem generis with the preceeding words. They cannot include alum mines, which are subsequently mentioned in rule 3. By rule 1, slate is classed with stone and limestone and chalk. These are all worked in quarries, and slate, which is not metallic, ought always to be assessed according to its nature, that is in the same manner as these substances.

A. L. Smith, in reply. When slate is worked from an open cutting, the owners ought to be assessed as for a quarry, but when the workings are carried on underground and cease to be a pit, they must be assessed as a mine. It is a question of fact whether the workings are a quarry or a mine, *Rex* v. *Sedgley* (3), and the facts stated in the present case clearly shew that the respondents are working a mine.

1879. Dec. 19. BRAMWELL, L.J. I am of opinion that the judgment should be affirmed. It seems to me that this is a clear case. We have not to consider what is the meaning of the words in the abstract, but what it is in the statute. Upon its true construction, I think that rule 2 must be confined to the mines therein mentioned, and to mines ejusdem generis. It cannot extend to all mines, because alum mines are expressly provided for in rule 3. The workings of the respondents are not ejusdem generis with the mines mentioned in rule 2. If the argument for the respondents that the workings are not a quarry is right, no assessment could be made upon them: the mode of working may

(1) Law Rep. 1 Ch. at p. 309. (2) Law Rep. 1 Ch. 303.
(3) 2 B. & Ad. 65.

be similar to that of a mine, but it does not follow from that that the workings are a mine. It is somewhat difficult to define what a quarry is, but I think that the word generally means a place where the material is got out in a large shape like blocks, and not where it is got in small pieces like coal and ironstone. The judgment is right, and ought to be affirmed.

BRETT, L.J. I also am of opinion that the judgment ought to be affirmed. In one point of view the workings might almost be called a mine, and the slate seems to be obtained by mining operations; nevertheless the works come within the first rule and not within the second. The statute imposes the tax upon what is worked and not on the mode of working. The only use of classifying the subject-matter of the tax is to ascertain the liability of those who are to pay; those who obtain one kind of produce are liable to one rate, and those who obtain a different kind must be assessed differently. It is a mode of assessment for the benefit of the producer. It is a tax on the profits arising upon sale. In one class of produce the profits are tolerably uniform; in the other they are very varying. I think that the words "quarry" and "mine" are not used to describe the mode of working, and if that is correct, the respondents' workings cannot be a mine within the meaning of the statute. Upon the words before us I have no doubt that the judgment of the Exchequer Division was right.

COTTON, L.J. We have not to decide whether the respondents' workings are a quarry or a mine, but upon what principle they are to be assessed. It is true that there are two modes of working; the one underground, by which coal, copper, and iron are obtained, and the other upon the surface, by which stone and chalk are got; but the distinction is not between the modes of working but between the materials raised, and I think it was intended to include even underground workings for slate in the first rule.

Judgment affirmed.

Solicitors for respondents: *Gregory, Rowcliffes, & Rawle, for Jones & Jones, Portmadoc.*

Solicitor for appellant: *Solicitor of Inland Revenue.*

1880
March 1.

THE LONDON AND SOUTH WESTERN BANK, LIMITED, *v.* WENTWORTH.

Bill of Exchange — Acceptance in Blank — Evidence inadmissible to shew Drawing or Indorsement a Forgery.

When a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled in with the name and signature of a person as drawer and indorser, the acceptor cannot, as against a bonâ fide indorsee for value, adduce evidence to shew that either the drawing or indorsement is a forgery.

THE action was tried before Pollock, B., and a jury in May, 1879. The facts and the arguments on behalf of the plaintiffs sufficiently appear from the judgment.

An order nisi having been obtained for a new trial, on the ground of misdirection in rejecting evidence of the drawing or indorsement of the bill being forgeries, and of the identification of one Head, a witness, with the person purporting to be the payee and also the person as from whom Villars (the person through whom the plaintiffs claimed) took the bill and in directing the jury on the evidence,

1879. Nov. 13. *D. Seymour, Q.C.*, and *Castle*, for the plaintiffs, shewed cause, and were stopped by the Court.

Gaskell (*R. Vaughan Williams*, with him), for the defendant. It is admitted that one who accepts in blank gives authority to write a fictitious name as drawer; but he gives no authority to give the bill currency in the name of a real person as drawer for a fraudulent purpose, nor to forge the signature of a real person either as drawer or indorser. The tendered witness Head might have proved that the signatures of the drawing or indorsement were imitations of his writing and forgeries, or he might have shewn that the drawing was genuine and the indorsement a forgery. In either case the plaintiffs could not recover; a forged indorsement gives no title even to a bonâ fide holder. Some one may have picked up the bill in the street and forged the indorsement. If the ruling at the trial was right, any one accepting in blank gives authority to draw in the name of Rothschilds or any other well-known names of good credit, and to give the bill currency by

forging their signatures as drawers and indorsers. No decisions have countenanced such a contention, and it is contrary to the principle of *Hogarth* v. *Latham* (1) and *Baxendale* v. *Bennett*. (2)

Cur. adv. vult.

1880. March 1. The judgment of the Court (Pollock, B., and Hawkins, J.) was delivered by

POLLOCK, B. The plaintiffs sued as indorsees of a bill of exchange for 500*l.*, alleged to be drawn by "S. H. Head" upon the defendant, accepted by him, and indorsed by "S. H. Head" to the plaintiffs. At the trial the plaintiffs proved by their manager that the bill had been brought to them by one Villars, who was senior partner of a well-known firm of upholsterers who had an account with the plaintiffs, and who had on former occasions brought to them trade bills to cover advances; that the bill was drawn and indorsed in the name of "S. H. Head" in the same handwriting, and accepted by the defendant; that the manager, after making inquiries at the defendant's bankers and receiving a satisfactory reply, made an advance equal to the full value of the bill. Villars stated that his firm had furnished one Samuel Head's offices, and it was admitted that the plaintiffs took the bill in good faith and without notice of any irregularity.

On the part of the defendant, he himself was called and proved that, being in want of money, he applied to an advertising money-lender calling himself Tillotson Smith, who undertook to obtain for him a loan of 400*l.*, upon his giving a bill for 500*l.*, and that upon the faith of this, he gave to Smith a piece of paper bearing a sufficient stamp, with his, the defendant's, signature across it where acceptances are usually written; nothing was said as to who should draw or indorse the bill, but the person calling himself Tillotson Smith gave to the defendant a receipt as follows:—

"12th March, 1878.

"Received of Capt. W. D. Wentworth an acceptance for 500*l.*, dated to-day for the purpose of negotiation, and if not discounted by the 14th instant to be returned at once.

"Tillotson Smith & Co."

(1) 3 Q. B. D. 643. (2) 3 Q. B. D. 525.

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And Mr. Samuel Heath Head proved that he was a solicitor having offices in the same house as Tillotson Smith & Co. He was then asked whether the indorsement of the bill was in his handwriting, but the question was objected to upon the ground that it was immaterial, and I rejected it.

Upon these facts, and an admission that the plaintiffs were bonâ fide holders for value, I ruled that they were entitled to recover, and directed the verdict and judgment to be entered for them.

An order nisi for a new trial was subsequently obtained, upon the ground that I ought to have admitted the evidence objected to, inasmuch as if the indorsement could be shewn to be irregular, the plaintiffs could not succeed; and that although the defendant by his signature must be taken to have admitted the drawing by "S. H. Head," he was not precluded from shewing that the indorsement was unauthorized. These questions were fully argued before my Brother Hawkins and myself, and we took time to consider what our judgment should be.

Before dealing with the rules of law by which the case should be governed, we think it well to state what we consider to be the result of the facts proved.

It was manifest that the defendant had been cheated out of the blank acceptance (1), but it was equally clear that he had given it for the purpose of having the name of a drawer and indorser inserted, and of its being negotiated to raise money. The name of the drawer and indorser was perfectly immaterial to the defendant, and could the name used be taken to be a fictitious name, the defendant would be liable. It was also admitted upon the argument that the defendant could not dispute that he was bound by the drawing of the bill, but it was said that he might dispute the indorsement. Now, the indorsement may be treated in two ways. It may be said that although a Mr. Samuel Heath Head was called to state that he never indorsed or authorized the indorsement of his name, this does not shew that it was a forgery, for S. H. Head might not mean Samuel Heath Head, and there might be several S. H. Heads, or the signature might be wholly fictitious; in which case, as the drawer's and indorser's

(1) He had received no money for his acceptance.

names were in the same handwriting, they would be binding on the defendant.

But the evidence, taken as a whole, seemed rather to shew that Smith, when he had obtained the blank acceptance, wrote the name of S. H. Head upon it, with the full knowledge that there was a Samuel Heath Head who had had dealings with Villars, and that he did this not with the intention of defrauding the defendant, nor indeed under the impression that Head would in fact be defrauded, since he supposed, no doubt, that the bill would be met by the defendant, but because if Head's name was on the bill he would the better be able to pass it on to Villars to discount, and as against the plaintiffs who objected to the evidence of Head, we think this is the fair assumption; and we also think it ought to be assumed that if Head had been allowed to answer he would have said that he usually signed his name "S. H. Head," and consequently that the use of his name was as against him a forgery, the effect of which would be to cast an apparent liability upon him if the defendant did not pay the bill.

This is the most favourable way of putting the case for the defendant, because it may be said that although by giving the blank acceptance he authorized the person to whom he gave it to insert some name, even a fictitious name, as drawer and indorser, he could not have intended to authorize him to commit a forgery, and if effect is to be given to this argument it would equally hold good with respect to the drawing as to the indorsing.

This, no doubt, raises a novel question, and one of some difficulty. It must be governed by the rules of law applicable not to cases in which the acceptor has signed his name after that of the drawer has been inserted, and so upon the faith of that name, but by those which ought to prevail where the acceptor has signed his name upon a blank piece of stamped paper, or on a paper upon which a drawing in blank has been written. In such a case, the acceptor is liable to a bonâ fide holder for value without notice, if the name of a stranger or a fictitious name be inserted as drawer, and the reason for this is not because the acceptor gave authority for this or that name to be inserted,—for in truth he gave no such authority,—but because in favour of commerce it is essential to uphold the negotiability of bills of

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exchange. That this is so, may be further illustrated by a case in which a fraud is practised upon the acceptor of a bill drawn in blank with reference to the amount.

A., owing a debt of 50*l.* to B., writes to him enclosing a blank paper with a stamp sufficient to cover a bill for 100*l.*, saying: "I do not know the exact amount of my debt, but fill up the enclosed for the amount and I will honour it at three months." B., in fraud of A., draws the bill for 75*l.*, indorses it, and it comes into the hands of a bonâ fide holder for value. Here is a clear absence of authority and a fraud against A., yet he is liable, and for the reason we have given. In the present case, although Smith was guilty of a fraud against the defendant collateral to the bill itself, the inserting of Head's name was, as respects the defendant, wholly immaterial, and was no part of the transaction by which the defendant parted with the blank acceptance. To him the result would have been the same in every respect, whether Smith had procured the wealthiest banker or the veriest pauper to actually sign his name as drawer or had himself inserted as drawer his own name, that of a stranger, a fictitious name, or that of Head, for in any case the defendant would be ultimately liable. Looking next to the effect upon the plaintiffs, with reference to the circumstances under which they took the bill, can it be said that the fact that Head's name appeared as drawer made any difference? They gave value for it, had no notice of fraud, and the forgery was no part of the transaction whereby they acquired the bill; they made all the inquiries as to the acceptor from his own banker that could be demanded from the most prudent persons. To require more of them, and say that they ought to have unravelled all the history of the bill, its drawing and indorsement, would be to create a new burden and cast a new duty upon indorsees of bills of exchange for which there is no precedent, and which would go far to hamper their negotiability and destroy their usefulness. Moreover, it would graft an exception upon a system of law which has worked well and is of great public use, for the benefit of one who has brought about the difficulty by his own irregular act.

It may be said that this course of reasoning would apply to the case of a bill drawn and accepted in due course and indorsed by a

forgery of the drawer's name, in which case the acceptor would not be liable even to a bonâ fide holder for value, but the two cases are not in pari materiâ. In the case last put the drawing and accepting of the bill are in proper order, and the acceptor is entitled to say: I accepted on the faith of the bill being drawn by a person of credit, and I am ready to pay to his order, but not to the holder of a forged indorsement. In such a case, the whole matter, quoad the acceptor, is real, and depends upon a real authority. In the present case, the defendant is in default from the beginning by giving a blank acceptance, and therefore, as is admitted in the cases of a drawing by a stranger or in a fictitious name, the ordinary rule as to authority cannot be adhered to, and something like a fiction must be resorted to in favour of a bonâ fide indorsee for value; or, as we should prefer to say, the law merchant in such a case holds that, although the acceptor did not authorize the drawer's name to be used, he enabled the person to whom he gave the bill to use it, and so to give the bill currency, and this as against the acceptor is sufficient to render him liable. Further, where an indorsement is forged there is a material distinction between the case of a bill drawn by a real person and one like that now under consideration, which materially affects the rights of the parties. Where the bill is drawn by a real person, not only have those who claim under a forged indorsement no title to the bill, but the title is in some one else who is entitled to have the bill restored to him and to sue upon it; and to his action a plea of payment to the man who claims under the forgery would be no defence. In the present case there is no real drawer, and the defendant could have paid the plaintiff without the risk of having to pay it a second time to another.

Let us now see to what extent the principles which are involved in the decision of this question have been considered and settled. Where a man signs his name to a blank stamped piece of paper, and delivers it to another to be negotiated, this gives him authority to fill it up to the amount which the stamp will cover, treating the signature as that of the acceptor, and if the bill thus completed is indorsed to a holder for value without notice, he is entitled to recover upon it against him who has so signed his name, although the person to whom the blank paper is originally

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given may have defrauded the man who gave it to him. This is clearly established by a long series of cases, amongst which are the following:—*Russel* v. *Langstaffe* (1780) (1), *Peacock* v. *Rhodes* (1781) (2), *Collis v. Emett* (1790) (3), and *Schultz* v. *Astley* (1836). (4)

The ground upon which these decisions have been rested is well explained by Maule, J., in *Montague* v. *Perkins* (5), and in the judgment of the Court in *Foster* v. *Mackinnon* (6), where after stating the general proposition that a man is not bound by his signature to an instrument if it be obtained by a fraudulent representation, it is said: "This principle when applied to negotiable instruments must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover."

In *Cooper* v. *Meyer* (1830) (7), bills having been drawn in a fictitious name, and accepted by the defendant and indorsed in the same handwriting as that of the supposed drawer, the defendant was held liable to the plaintiff who was a holder for value. Lord Tenterden in giving judgment says: "The acceptor ought to know the handwriting of the drawer, and is, therefore, precluded from disputing it; but it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so, but if there is in reality no such person, I think the fair construction of the acceptor's undertaking is that he will pay to the signature of the same person that signed for the drawer."

In the above case the bill was accepted after it was drawn, and

(1) 2 Dougl. 514.
(2) 2 Dougl. 633.
(3) 1 H. Bl. 313.
(4) 2 Bing. N. C. 544.
(5) 22 L. J. (C.P.) 187.
(6) Law Rep. 4 C. P. at p. 712.
(7) 10 B. & C. 468.

Lord Tenterden appears to have thought that in such a case if the drawer be a real person the acceptor, though bound by the drawing, may dispute the indorsement. The same view was taken by this Court in *Beeman* v. *Duck* (1843) (1), and is in accordance with what was laid down with reference to such bills in *Smith* v. *Chester* (1787) (2) and *Robinson* v. *Yarrow* (1817). (3) Not long after *Cooper* v. *Meyer* (4), however, came the case of *Schultz* v. *Astley* (1836). (5) The defendant had given to a money lender, among others, two slips of stamped paper, on which were written acceptances signed by himself, and for which he received nothing; a man named Clissold afterwards wrote his name on one of these, and it was then filled up as a bill of exchange. The second paper was filled up as a bill of exchange by a person who subscribed himself in the character of drawer and indorser as Thomas Wilson, his real name being Thomas Wilson Richardson. The two bills having been indorsed to the plaintiff for value, he sued the defendant upon them, and the Court held that he was liable, and in giving judgment say (6): "As to the bill drawn by Clissold the objection is, that admitting a party may be bound by his acceptance written on a blank piece of stamped paper, to the extent of such sum as the stamp will cover, yet that this giving of a blank acceptance authorizes only the party to whom it is given to draw the bill; or at all events does not authorize Clissold, a stranger, to sign his name on the same blank piece of paper as drawer, the bill itself being subsequently written upon the paper by some other person. No authority has been cited to us for any such restriction of the general doctrine above admitted; nor can we see any distinction in principle where the bill has passed into the hands of third persons, between holding the acceptor liable to a given amount, when the bill is afterwards drawn in the name of the party who has obtained the acceptance, and when it is drawn by a stranger who becomes the drawer at the instance of the party to whom the acceptance is given. The blank acceptance is an acceptance of the bill which is afterwards put upon it; and it seems to follow from the doctrine of Lord Mansfield in *Russell*

(1) 11 M. & W. 251.
(2) 1 T. R. 654.
(3) 7 Taunt. 455.
(4) 10 B. & C. 468.
(5) 2 Bing. N. C. 544.
(6) 2 Bing. N. C. at p. 552.

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v. *Langstaffe* (1), that it does not lie in the mouth of the acceptor to say that the drawing or indorsing of the bill is irregular. The acceptor was a stranger to the party to whom he handed over his blank acceptance, and as all that he desired was to raise the money, it could make no difference to him, either as to the extent of his liability, or in any other respect, whether the bill was drawn in the name of one person or another. And if the defendant is estopped from denying the right of the drawer to draw the bill, whoever he may be, he is bound by the indorsement made by such drawer, after such indorsement is proved to have been made by such drawer.

"As to the bill which purports to have been drawn by Wilson, the proof was that it was drawn and indorsed by a real person, who signed the name Thomas Wilson, although his real name was Thomas Wilson Richardson. There were no circumstances proved to shew an intention to pass himself off for a different person of the name of Thomas Wilson, or an intention to defraud any person of that name, or any other person; and we, therefore, think there is no ground for treating the signature as a forgery, or holding the bill void on that account."

We have cited the remarks of the Court as to both of the bills, although those as to the second bill may appear to be not in accordance with the view we have taken, but it is to be observed that the observations as to forgery were unnecessary to the decision of the case, and the question which has arisen in the present case was not before the Court. The principles which are laid down with reference to the first bill, if applied to the facts before us, would go far to decide the point of law in the plaintiffs' favour.

In many of the cases and text-books in which the liability of the acceptor of a bill of exchange under circumstances similar to those which occurred in the present case has been discussed, it has been rested upon the ground of estoppel; and with reference to this, Bramwell, L.J., has recently said with great force in the case of *Baxendale* v. *Bennett* (2), "Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against

(1) 2 Dougl. 514.

(2) 3 Q. B. D. 325, at p. 529.

whom it is used has so conducted himself, either in what he has said or done or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done or failed to say or do." This language might be not improperly applied to the present case, but, for our own part, we should prefer not to use the word estoppel, which seems to imply that a person by his conduct is excluded from shewing what are the true facts, but rather to say that the question is whether, when all the facts are admitted, the acceptor is not liable upon the well known principle that where one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the third person to commit the fraud. Looking at the case from this point of view, the law as laid down in *Young* v. *Grote* (1), where the Court held that the drawer of a cheque who so carelessly fills it up as to enable the holder of it to add figures making it payable for a larger amount is liable to the banker who honours it, is in favour of the plaintiff, and although many observations have been made since that case with reference to the grounds upon which it was decided, which are mostly collected in the judgment of the Common Pleas Division in *Arnold* v. *Cheque Bank* (2), the principle we have alluded to has always been upheld. In the *Bank of Ireland* v. *Evans' Trustees* (3), Baron Parke, speaking of *Young* v. *Grote* (1), said: "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment."

Our attention was called during the argument for the defendant to two recent cases decided by the Court of Appeal—*Hogarth* v. *Latham* (4) and *Baxendale* v. *Bennett* (5), but neither of these have any real bearing upon the present case. In the first the plaintiff received only a bill accepted by the defendant, but without any drawer's name. At this time he had no notice of any irregularity,

(1) 4 Bing. 253.
(2) 1 C. P. D. 587.
(3) 5 H. L. C. 389, at p. 410.
(4) 3 Q. B. D. 643.
(5) 3 Q. B. D. 525.

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but afterwards, when he filled in the name of his firm as drawers of the bill, the jury found he had notice that there was something wrong, and the bills had in fact been accepted without authority. In *Baxendale* v. *Bennett* (1) the bill sued on bore the defendant's signature, and purported to have been drawn and indorsed by Cartwright, and also indorsed by Cameron, from whom the plaintiff received it, but before it had been so drawn or indorsed, and whilst it was a mere blank paper with a bill stamp and the defendant's signature upon it, it was stolen from the defendant's drawer, and therefore never had been given to Cartwright or any one from whom he received it, to be negotiated or in any way treated as a bill of exchange.

In conclusion, it may be added that no assistance can be gained in the present case by reference to the law of France relating to bills of exchange, or to the codes of other continental nations, which are mostly founded upon that of France, and this for a reason which appears to us to give weight to the arguments adduced in favour of the plaintiffs. By the Ordonnance of 1673, which is referred to by Pothier in his Traité du Contrat de Change, part I., ch. 3, s. 1, it was made essential to a bill of exchange that it should mention the drawer, acceptor, and payee, and the law remains in substance the same, as will be seen by referring to the Code de Commerce, Art. 110, so that a blank acceptance is inadmissible. The distinction between the English and the French system is well described by Mr. Chalmers in the Preface to his valuable Digest of the Law of Bills of Exchange, where he says, The French Law "remains in substance what it was two hundred years ago. English Law has been developed piecemeal by judicial decision founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt due in one place was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French Law steadily keeps in view. In England, bills have developed into a perfectly flexible paper currency. In France a bill represents

(1) 3 Q. B. D. 525.

a trade transaction; in England it is merely an instrument of credit. English Law gives full play to the system of accommodation paper; French Law endeavours to stamp it out."

That this is a correct account of the spirit in which the English Law has dealt with the negotiability of bills of exchange is further evidenced by the mode in which effect is given to it in favour of bonâ fide indorsees for value by modern legislation. Thus the earlier Acts, 16 Car. 2, c. 7, and 9 Anne, c. 14, wholly avoided certain securities given for a gaming consideration, but the 5 & 6 Wm. 4, c. 41, s. 1, after reciting the hardship and injustice which arises where such securities are indorsed for a valuable consideration without notice, repeals the earlier provisions, and provides merely that such securities shall only be taken to have been given for an illegal consideration, leaving the rights of bonâ fide holders for value without notice of the original illegality intact.

In the result, therefore, it appears to us that there is no authority binding upon us which requires that we should give judgment for the defendant, and that the spirit of such authorities as can be found are in favour of the plaintiffs, and accord with what, in our view, are the legal merits.

The order nisi for a new trial will therefore be discharged with costs.

Order discharged.

Solicitors for plaintiffs: *Vallance & Vallance.*

Solicitor for defendant: *C. A. Hilliard.*

1880
Jan. 21.

[IN THE COURT OF APPEAL.]

WEBB *v.* EAST.

Practice—Production of Documents—Privileged Communications—Tendency to Criminate.

A party cannot protect himself from producing a document on the ground that its production would tend to criminate him unless he pledges his oath that, to the best of his belief, its production would tend to criminate him.

Whether a party can protect himself from producing a document on the ground that its production would tend to criminate him, *quære*.

A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements it will not support an action for libel unless malice is shewn; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party.

THIS was an appeal from a decision of the Exchequer Division. (1)

The plaintiff's statement of claim, was to the following effect:—

That the plaintiff had been the steward of the estates of the defendant, and quitted the defendant's service at the notice of the defendant in March, 1879, and received from the defendant a written character, dated the 3rd of March, 1879. That on the 8th of April, 1879, the plaintiff was engaged as steward by Earl Rosslyn, and was to enter on his duties on the 14th of that month. That on or about the 9th of April, 1879, the defendant, in letters addressed to Earl Rosslyn, falsely and maliciously made certain defamatory statements about the plaintiff, which were set out in the statement of claim, being, inter alia, that the plaintiff had falsified his accounts and misappropriated moneys. That in consequence of the said libels Earl Rosslyn refused to allow the plaintiff to enter upon his duties as steward, and dismissed him from his service. That by reason of the premises, the plaintiff had lost the salary and remuneration he would have earned in the service of Earl Rosslyn, and had been unable to obtain another situation as steward, and had been greatly damaged in his credit and reputation.

By his statement of defence the defendant denied that he wrote

(1) 5 Ex. D. 23.

to Lord Rosslyn the letters mentioned in the statement of claim, or any of them, and stated that any letters written by him to Earl Rosslyn relating to the plaintiff were confidential and privileged communications, and written by the defendant in answer to inquiries made by Earl Rosslyn as to the character of the plaintiff, who had been in the employ of the defendant as his steward.

The defendant, in answer to interrogatories, deposed that he did, on or about the 9th or 10th of April, 1879, and the 14th of April, 1879, respectively, write a letter to Lord Rosslyn. "Those letters will speak for themselves. They were written by me in consequence of letters which I had received from Lord Rosslyn relating to the plaintiff who had been my steward. My letters to Lord Rosslyn were confidential, and I contend that they are privileged communications." He went on to admit that he had copies of them in his possession.

The plaintiff applied for inspection and liberty to take copies of, and extracts from, the above copies. This was refused by the Master. Upon appeal, Denman, J., referred the application to the Divisional Court.

The case was heard by Kelly, C.B., and Stephen, J., who, on the 12th of December, 1879, made an order for inspection, on the ground that the defendant could only protect himself from production by stating on oath that he believed the production of the documents would expose him to a criminal prosecution. (1) The defendant appealed.

Fischer, Q.C., and *R. E. Turner*, for the defendant. Production ought to be refused on the ground that it may expose the defendant to a criminal prosecution. It is not necessary that this objection should be taken on the oath of the defendant, it appearing from the nature of the case that production would tend to criminate him: *Hill* v. *Campbell* (2); *Atherley* v. *Harvey*. (3)

[JESSEL, M.R. According to the rule in equity a defendant was not bound to answer where doing so might tend to criminate him, but is there any authority that he can decline to produce a document because it might tend to criminate him?]

Cartwright v. *Green* (4) is in the defendant's favour.

(1) 5 Ex. D. 23.
(2) Law Rep. 10 C. P. 222.
(3) 2 Q. B. D. 524.
(4) 8 Ves. 406.

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[JESSEL, M.R. That case does not relate to production.]

Secondly, the letters are privileged: *Gardner* v. *Slade.* (1) The plaintiff has no case unless he can shew express malice, and until that is shewn production ought not to be ordered.

[JESSEL, M.R. May not the case come within Order XXXI., rule 19. Ought not the question of express malice to be tried before production is ordered? It is a very serious matter if every servant who receives such a character that he is not engaged can bring an action for libel, and obtain production of all the letters that have passed.]

It is contended that the issue of malice ought to be first tried, to allow production in such cases will tend to make masters refuse to give any character at all.

[COTTON, L.J. It seems to me that the letters themselves may possibly prove express malice.]

There ought to be some primâ facie evidence of malice—this is a mere fishing application. The plaintiff professes to set out extracts from the letters in his statement of claim, but he does not really know their contents.

[Counsel for the plaintiff admitted this to be the case.]

Bompas, Q.C., and *P. H. Smith*, for the defendant. No case can be found where production of documents has been refused on the ground of their tending to expose the party to prosecution except *Hill* v. *Campbell.* (2) It is difficult to reconcile that case with *Fisher* v. *Owen* (3), and the judges were agreed that at common law inspection might have been ordered. *Atherley* v. *Harvey* (4), as is stated in *Fisher* v. *Owen* (3), went on a misunderstanding of the rule in equity. *Allhusen* v. *Labouchere* (5) supports the plaintiff's case. Then as to privilege, the defendant is confusing the two meanings of the word. Confidential communications of this kind are privileged only in the sense that they are not treated as libels unless malice is shewn; but they are not privileged from production, that privilege being confined to communications with legal advisers, *Bustros* v. *White* (6): which also shews that there is no discretion as to refusing production.

(1) 13 Q. B. 796.
(2) Law Rep. 10 C. P. 222.
(3) 8 Ch. D. 645.
(4) 2 Q. B. D. 524.
(5) 3 Q. B. D. 654.
(6) 1 Q. B. D. 423.

Fischer, Q.C., in reply.

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JESSEL, M.R. The question raised by this appeal is one of very considerable importance as regards the interests of society at large, and especially as regards the interests of that large part of society which consists of masters and servants.

The case for the present purpose may be shortly stated in this way. A steward of Sir Gilbert East left his service. He afterwards applied for a similar situation under the Earl of Rosslyn. The Earl of Rosslyn was willing to engage him, and did in fact engage him, subject to his character proving satisfactory. He wrote to Sir Gilbert East about the man, and received a letter in answer giving him what Lord Rosslyn thought was a bad character, and thereupon his lordship declined the man's services. The man then brought an action against Sir Gilbert East for libel. Of course such an action can only be maintained by establishing that material statements as to the character of the servant were not only untrue, but were untrue, if I may put it in that way, to the knowledge of Sir Gilbert East, and were stated maliciously and not with the bonâ fide intention of giving the man a fair character, but with a view to prevent his getting a new service.

The plaintiff in the action has neither the letter that was written by Sir Gilbert East nor a copy of it. Lord Rosslyn has the original letter, Sir Gilbert East has a copy of it, and the plaintiff wishes to obtain that copy from Sir Gilbert East.

Now it is manifest that the copy in question is material on every issue in the cause. The nature of the charges, if charges they were, made against the servant in the letter, must have a considerable influence upon the decision of the issue as to whether they were false charges, also as to whether they were false to the knowledge of the defendant, and as to whether, from their nature, they were instigated by malice. It is impossible not to see, therefore, that it is a very material document in the case.

The defendant says that the document is privileged. It is privileged in this sense, that it is what is called a privileged communication, which I understand to mean this, that primâ facie, that is, in the absence of evidence to the contrary, it is to be

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considered as being given bonâ fide and without malice, and is an exception to the rule that a man who libels another must, in order to justify himself, prove the truth of the libel, it being in this case for the plaintiff to prove the malice. But such a communication is not privileged, as far as I am aware, in any other sense. I never before this case heard it suggested that such a letter was privileged in the sense of being privileged from production, except on the ground which is now suggested, that it may criminate the defendant. Now it is obvious that it cannot have that tendency unless the action ought to succeed, because the letter cannot be a libel unless the defendant was actuated by malice. He therefore cannot plead that the document would criminate him without at the same time confessing the action. If such a defence could be available at all it ought only to be available at the instance of a defendant who will undertake to swear that the production of the document will criminate him.

It is not necessary on the present occasion to give, nor do I intend to give, an opinion as to whether documents can be protected from production by an allegation on oath that if produced they would criminate, or tend to criminate, the person asked to produce them, by which I mean that they would support an indictment against him. I decline to decide that point, not because I have not an opinion on the subject, but because it is not necessary for me now to express it. But even assuming, for the purpose of argument, that such a ground could avail a defendant called upon to produce such a document, it is clear to my mind that it could only avail him on such terms as it could avail him in answering interrogatories or giving other discovery, namely, upon his pledging his oath that to the best of his knowledge, information, and belief, the result of his production of the document would be to criminate him.

Now, as I have already said, it is quite impossible for the defendant in this case to make such an affidavit, and therefore there is no occasion to give him the opportunity of making it. He never could be advised to make it, and would not make it. That being the case, it appears to me that this is a document which is not privileged from production, and that consequently the order of the Court below was right and ought to be affirmed.

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BAGGALLAY, L.J. I am also of opinion that the production of these letters cannot be refused on the ground of privilege. That such documents are privileged in a certain and very common sense of the word is no doubt true, but they are not privileged documents within the meaning of the decision in the case of *Bustros* v. *White* (1), in which the question of what were documents entitled to protection on the ground of privilege arose and was very fully considered by the Court consisting of numerous judges. The marginal note in that case lays down the rule as to what are the documents to which privilege applies, viz., that no document other than a document of title is privileged except a communication from the party's solicitor or from an agent employed by or at the instance of the solicitor.

But then it is said that the production ought to be refused upon the ground that the inspection of the copies or the letters might tend to expose the defendant to criminal proceedings. Now I agree that if that could be a sufficient reason for refusing to permit the inspection of the documents, it is a reason which must be verified by the oath of the party who seeks to rely upon it. In this case, and probably for the best of reasons, the defendant's advisers do not ask for the opportunity of making such an affidavit, and I must confess I think there is great force in the observation of Mr. Bompas that to make such an affidavit would be inconsistent with the nature of the defence which has been raised. It therefore is not necessary to consider what would be the effect if such an affidavit had been produced.

COTTON, L.J. I am also of opinion that we cannot refuse production of these documents. The Court in these cases has not to exercise any discretion. If the plaintiff can claim production it is of right. The general rule is undisputed that a litigant plaintiff or defendant has a right to the production of all documents in the possession of his opponent which are relevant to the issues to be decided in the action. In the present case it cannot be disputed that the production of these letters is material both with regard to the question whether certain defamatory statements were made and also upon the question whether or

(1) 1 Q. B. D. 423.

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no they were made under such circumstances as to be privileged.

Upon what ground, then, does the defendant refuse production? He relies upon two grounds, one is, that the production of the letters would tend to criminate him, that is to say, would tend to subject him to criminal proceedings for libel. I agree that it is better not to express an opinion as to whether that is any protection from production of documents. But I also agree with the rest of the Court that if that is a ground for refusing production as it is for refusing to answer interrogatories, the protection must be claimed by the party seeking to protect himself from discovery in the same way as he would claim to protect himself from answering interrogatories, that is to say, by making an affidavit pledging his belief that answering the question would tend to criminate him.

With regard to the other question of privilege, the whole argument turns upon the ambiguous meaning of the word privilege. No doubt we are in the habit of saying that the Court may refuse production of documents upon the ground that they are privileged, which means that they are privileged as communications between a party and his legal adviser. The documents now in question are no doubt in a sense privileged if the defendant is right in saying that they were letters written bonâ fide in answer to inquiries about a servant—but privileged in what sense? Not privileged from production, but privileged in this sense only, that although they may contain defamatory statements, the law under the circumstances will not impute malice, but the plaintiff, in order to sustain an action for libel upon them, must shew that they were written maliciously.

Then ought we to extend to such documents as these the rule as to privilege from production? No doubt it may be very inconvenient to produce letters such as those in this case, but for a long series of years courts of equity have been strict in refusing to extend the rule as to privilege from production, and in my opinion we ought not now to make this extension, but ought to adhere to the old rule and say that privilege from production on the ground of the document being a privileged communication extends only to communications between a plaintiff or a defendant and his legal advisers.

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I ought to add that the language of my judgment in the present case must not be taken in any future case as any intimation that I should not have directed the documents to be produced even if there had been an affidavit made by the defendant.

BAGGALLAY, L.J. I may also say that I desire to keep my judgment open upon that point.

Solicitors: *Parkers; Williams, James, & Wason.*

[IN THE COURT OF APPEAL.]

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Dec. 13.

JONES AND OTHERS *v.* HOUGH AND OTHERS.

Ship and Shipping—Charterparty—Bills of Lading, Master refusing to sign—Conversion of Cargo—Practice—Trial by Judge without Jury—Motion for new Trial.

By a charterparty the defendants agreed to carry for the plaintiffs a cargo of coke from C. to B. the master to sign the bill of lading as presented within twenty-four hours after the cargo should be on board, or pay 4*d.* per ton per day for each day's delay as damages. The cargo having been loaded, a bill of lading was presented to the master, which he refused to sign without inserting a clause that the vessel should not be liable for duties on cargo caused by non-arrival before a specified date. The plaintiffs having declined to accept such a bill of lading, the master sailed with the cargo for B. without signing any bill of lading. The plaintiffs directed their consignee to deduct the penalty under the foregoing clause. The master was willing to deliver the cargo on payment of the freight in full, but the consignee having insisted upon deducting the penalty, the master declined to deliver the cargo, and landed it and stored it at B.:—

Held (1.), That there had been a breach of the charterparty in the master not having signed the bill of lading as presented to him. (2.) That the plaintiffs were not entitled to deduct the penalty for delay in signing the bill of lading. (3.) That there had been no conversion of the cargo. (4.) The plaintiffs were only entitled to nominal damages for not signing the bill of lading, the master being willing to deliver the cargo on payment of the full freight.

Where a trial has taken place before a judge without a jury, the Court of Appeal, in all cases except that of surprise, has jurisdiction upon an appeal to review the findings as to the facts, without a rule for a new trial having been obtained.

ACTION upon a charterparty, the claim alleging by way of breach that the master of the ship *Ellen*, acting by the direction of the defendants, would not sign certain bills of lading as presented, according to the charterparty, unless he were permitted

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to insert therein the words "the vessel not liable for duties on cargo caused by non-arrival before 1st July;" and also alleging, in the alternative as to damages, that the sum of 488*l.* 16*s.* had become due from the defendants to the plaintiffs for delay in signing the bills of lading at the rate of 4*d.* per registered ton per day, as per charterparty, on 611 tons for forty-eight days from the 1st of July, 1877, to the 18th of August, 1877, when the action was commenced. And, further, the plaintiffs sued for the wrongful conversion of the plaintiffs' coke.

At the trial before Lindley, J., without a jury, at the London sittings on the 26th of March, 1879, the following facts were proved: On the 13th of June, 1877, a charterparty was entered into between the plaintiffs and defendants, the material parts of which were that the ship *Ellen*, of which the defendants were owners, should proceed to Cardiff, and there take on board as tendered a cargo of coke, which the merchants bound themselves to provide for shipment, and should therewith proceed to Bilbao, and there, as ordered, deliver the same on being paid freight at the rate therein mentioned, the ship paying all charges whatsoever, the freight to be paid one-third (if required) in cash on signing bills of lading, less 3 per cent. for all charges, and the remainder on right delivery of cargo in cash at the current rate of exchange, cargo to be brought and taken alongside at merchants' risk and expense. A sufficient quantity of coal to be taken on board for ship's use, to be supplied by shippers at 10*s.* per ton, to be indorsed on bills of lading, which documents the master thereby agreed to sign, as presented for the weight according to the railway company's or shipping returns, without prejudice to the tenor of the charterparty, within twenty-four hours after the cargo should be on board, or pay 4*d.* per registered ton per day for each day's delay as damages; the ship to be addressed inwards only to charterers' agent at port of discharge, paying the usual commission of 2 per cent. on the charter. The charter being concluded by Richard W. Jones & Co. (the plaintiffs) on behalf of others, it was agreed that all liability of the former should cease as soon as they had shipped the cargo, the ship having a lien upon the same for all freight, dead freight, demurrage, average, and other charges.

At the time of making the charterparty the vessel was on a voyage to Newport, and after her arrival at Cardiff the plaintiffs, being under the impression that if the ship did not arrive at Bilbao by the 30th of June the Spanish Government would increase the duties then payable on coke, and being anxious therefore that the vessel should arrive at Bilbao by that day, wrote to the defendants on the 22nd and the 25th of June, 1877, complaining of delay on the part of the shipowners in discharging the cargo which was then on board, and pointing out to them the importance of the ship arriving by the 30th of June.

At the time of making the charterparty the plaintiffs had contracted with Ybarra & Co., at Bilbao, for the sale to them of 500 tons of coke to be shipped in England, and consigned to them at 23*s.* per ton, including freight and insurance. The plaintiffs advised Ybarra & Co. of having entered into the charterparty, and sent them a copy. On the 23rd of June the plaintiffs wrote to Ybarra & Co., telling them that they would have to deduct the extra duties which might be imposed on coke from the freight. It appeared, however, that the plaintiffs' fears in this respect were unfounded, and that the Spanish Government had not imposed any increased duties on coke.

On the 30th of June, 1877, the plaintiffs presented to the master of the vessel at Cardiff bills of lading for the coke deliverable to order for his signature according to the terms of the charterparty. The defendants were apprehensive that some attempt would be made to stop the increased duties if they became payable from the freight when the ship arrived at Bilbao, and on their instructions the master declined to sign the bills of lading in the ordinary form, but insisted on inserting the words following: "The vessel not liable for duties on cargo by non-arrival before the 1st July." A discussion ensued, in which the plaintiffs insisted that the master should sign the bills of lading or take the consequences: and the defendants offered that on the plaintiffs guaranteeing that no stoppage should be made, to sign the bills of lading.

On the 30th of June the vessel sailed from Cardiff with the coke on board without the master having signed bills of lading, and arrived at Bilbao on the 4th of July, 1877.

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The plaintiffs in the meantime had sent the bills of lading unsigned by the master to Ybarra & Co. indorsed to them, and on the 30th of June wrote requesting them to deduct 4*d.* per ton per day from the freight under the clause in the charterparty as the penalty for not signing bills of lading.

On arrival at Bilbao the master having been told by the plaintiffs at Cardiff that the cargo of coke was consigned to Ybarra & Co., moored the ship at their wharf and allowed the discharge to commence; but having been informed by Ybarra & Co. that they were going to deduct 50*l.* from the freight owing to his not having signed the bills of lading at Cardiff, the master refused to allow the deduction, and stopped any further delivery; fifty tons of coke, however, had been delivered. Ybarra & Co. having declined to pay the full freight for the coke, the master, therefore, discharged the remaining portion of the cargo at another wharf and stored it.

On these facts the learned judge decided: 1. That the defendants had been guilty of a breach of the charterparty in not having signed the bills of lading; 2. That the plaintiffs were not entitled to deduct the 4*d.* per ton per day from the freight; 3. That the defendants in taking away in their ship the plaintiffs' coke had converted the coke to their own use, and he directed a verdict to be entered for the plaintiffs for 399*l.* 17*s.* 6*d.*

The defendants appealed, on the ground that the judgment should be entered for the defendants.

They also obtained a rule for a new trial, on the grounds of misdirection, of the verdict being against the weight of evidence, of excess of damages, and of surprise.

Dec. 11, 1879. *Holl, Q.C.*, and *Douglas Walker*, for the defendants, contended: first, that the plaintiffs, by threatening to deduct the amount to be paid by them for additional duties rendered it incumbent on the master to protect his owners by inserting in the bill of lading the clause objected to; and that the plaintiffs ought to have accepted the bill of lading with such clause, for its insertion would not have affected the title to the cargo nor the negotiability of the bill of lading: and even if the plaintiffs had been compelled to pay the duties, the clause would

not have estopped them from recovering from the defendants if they were liable; there was, therefore, no breach of the charterparty by the defendants, the master being willing to sign the bill of lading in the form suggested; secondly, that the plaintiffs had no right to deduct the penalty, for on the construction of the clause the liability was only to attach in cases where the bill of lading had actually been signed after a delay in doing so; thirdly, that there had been no conversion, for the carrying the coke to Bilbao was in accordance with the terms of the charterparty.

Dec. 12, 13, 1879. *Cohen, Q.C.*, and *Jelf*, for the plaintiffs, contended: first, that there had been a breach of the charterparty, for it was the duty of the master to sign the bill of lading as presented, and under the charterparty he had no right to insert any additional term in the bill of lading; secondly, that the plaintiffs were entitled to deduct the penalty for the delay; thirdly, that on the authority of the cases of *Falke* v. *Fletcher* (1), *Hiort* v. *Bott* (2), and *Peek* v. *Larsen* (3), by sailing from the port of loading without the bill of lading having been signed the defendants had been guilty of a conversion of the coke.

They also contended that even if the findings of fact by the judge were wrong, yet while they stood unimpeached the judgment entered upon them was right, and that the findings could not be questioned upon an appeal; and that the defendants were only entitled to a new trial.

Holl, Q.C., was not heard in reply.

Dec. 13. COCKBURN, C.J. We are agreed that the appeal must be allowed to a certain extent. We think that the plaintiffs are entitled to recover for the breach of contract on the part of the master in not signing a proper bill of lading, but that, on the other hand, the plaintiffs have sustained no real damage, because it is quite clear that the consignees, Messrs. Ybarra & Co., would have been ready to accept the cargo and pay the full freight if the plaintiffs had not written the letter of the 30th of June. I am bound to say that I think the learned judge was wrong (he

(1) 18 C. B. (N.S.) 403; 34 L. J. (C.P.) 146. (2) Law Rep. 9 Ex. 86.
(3) Law Rep. 12 Eq. 378.

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was misled, it was not brought to his attention) in saying that the departure of the vessel without a bill of lading being signed amounted to a conversion. I do not think it did. I think the case is distinguishable from *Peek* v. *Larsen*. (1) This is a most material circumstance in that case that the shipper of the goods, finding he could not get a bill of lading without reference to the terms of the charter, said, "That is not the contract upon which I desired to enter, or upon which I shipped my goods." If, in the present case upon the master refusing to sign such a bill of lading as he ought to have signed, the plaintiffs had said, "Then give us back our cargo, we are not prepared to send the cargo to Spain without a bill of lading," the case might have been very different, and might have come, I do not say it would, within the facts and authority of *Peek* v. *Larsen* (1); but such were not the facts here. The captain was bound to do two things; to take the cargo to its destination, according to the terms of the charterparty, and he was also bound to give a bill of lading in the usual form, and not in the form upon which he insisted; but those are two distinct things, and two separate parts of one general contract. One of the things he was to do under the contract was to take the cargo to Bilbao, and so determine the contract. Without any protest on the part of the plaintiffs, I think it is impossible to say that that amounts to a conversion, the only purpose and intention of taking away the cargo being to fulfil the contract under the charterparty, and to deliver it at Bilbao, the place to which he was to take it according to such directions as the plaintiffs gave.

Then it becomes necessary to see what was done when the goods arrived at Bilbao. It is clear that instead of treating it as a conversion, the plaintiffs would have been willing to treat the goods as their own, and have their contract with Messrs. Ybarra & Co. completed; and to have the opportunity of enforcing the penalties under the charterparty. What was the position of Messrs. Ybarra & Co.? Messrs. Ybarra & Co. were perfectly prepared to take the cargo; I think that is a fact about which there can be no doubt; they were quite willing to take it without the bill of lading, because they were the ultimate vendees of the cargo, and as long as they had their cargo they were willing to pay the freight which they knew

(1) Law Rep. 12 Eq. 378.

was the freight to be paid. They were in no way prejudiced by not having the bill of lading, and it is clear to my mind that they were ready to take the cargo, and pay what they had agreed to pay, by the terms of their contract to the plaintiffs. The plaintiffs interfere, and they ask Messrs. Ybarra & Co. to abstain from fulfilling their engagement, and not to take the cargo except upon terms of deducting the amount claimed for penalties from the freight. What was the captain's position? Does what he did on the occasion amount to a conversion? I say assuredly not. The captain is bound in duty to his owners to take care that the freight is paid, because the parties claiming were the recipients of the cargo out at Bilbao. By the terms of the charterparty the moment the coke was loaded and conveyed to its destination, the charterers were to be absolved from all further liability, and if the captain had submitted to this deduction for his freight he certainly could not have recovered it from the plaintiffs, nor could he have recovered it from Messrs. Ybarra & Co., consequently it would have been lost to his owners. He was therefore perfectly justified in saying, "I have a right to my freight;" and Messrs. Ybarra & Co. said, "We have received advices from the parties telling us not to pay it." Contends the captain, "I cannot take the cargo back to England; I cannot stay here; all I can do is to land the cargo and warehouse it for whom it may concern. If I cannot get my freight the worse for me and my owners." And he has to warehouse it. Therefore, under the circumstances, it is impossible to say that the plaintiffs did not deal with the cargo in such a manner as to assert their ownership when it got to Bilbao; consequently, if there was any conversion at Cardiff, which I do not think there was, that conversion would be affected by what took place at Bilbao, and, in the second place, it seems to me that there was no conversion on the part of the master at Bilbao, because he only did that which he was fairly entitled to do, namely, to refuse to part with the cargo until he got his full freight paid.

There was no conversion, but there is a case of a breach of contract, though not a breach of contract upon which the plaintiffs could have established any real substantial damage, because they had the matter in their own hands, and if they had not insisted

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upon the deduction of the penalty, the cargo would have been delivered to the consignees, and the consignees would have paid the freight and the amount for the cargo, and no persons would have been damnified. I think, therefore, that there should be nominal damages to the amount of one shilling, leaving each party to pay their own costs, as they are both in the wrong.

BRAMWELL, L.J. I entirely agree. First, I desire to say a few words as to our jurisdiction. If, upon the materials before the learned judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to and not accept his finding. I have not the slightest doubt such is our power and duty. A great difference exists between a finding by the judge and a finding by the jury. Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty: and if, upon these materials, judgment ought to be given in any particular way different from that in which Lindley, J., has given it, we ought to give that judgment.

On the main question I do not agree with Lindley, J., that there is a conversion. I do not desire to repeat what my Lord Chief Justice has said, because I entirely concur with him. I wish, however, to make a remark on the case of *Falke* v. *Fletcher*. (1) In this case the goods are put on board the ship, and the ship sails with them and takes them to Bilbao for the purpose of executing the contract, which the defendants had entered into with the charterers. In the case of *Falke* v. *Fletcher* (1) it was different, because what Falke said there, and had a right to say, was, "Give me bills of lading, so that I shall have the control of my goods." But the defendant there said, "No, it is De Mattos's salt, and I shall take it to De Mattos and deliver it to him; I will not give you bills of lading, and recognise your property in the goods."

(1) 18 C. B. (N.S.) 403; 34 S. J. (C.P.) 146.

The cases, therefore, are entirely different. Suppose this was a contract on the part of the defendants, by which the plaintiffs might treat the sailing away from Cardiff as a conversion if they think fit to do so. They do not think fit to do so, because, when the vessel arrives at Bilbao, their consignees, persons acting under their direction, treat these goods as goods which are to be delivered to them, and they actually take delivery of thirty tons. I put that as a criterion. If the defendants had converted the cargo to their own use, whose property are the thirty tons that were delivered? Have they been re-converted to the use of Messrs. Ybarra & Co., or the plaintiffs? It cannot be said that they have. I think there was no conversion, therefore, under the circumstances.

I also wish to say a few words as to the penalties. The plaintiffs have argued that under this charterparty the penalties are still going on, and I suppose will go on to the end of time, because, certainly, I cannot think the plaintiffs are bound to accept a bill of lading now, and I do not see when they are to stop. Where there is a terminus a quo and a terminus ad quem, there the penalties may accrue due. Take the case of a building contract; the terminus a quo is the time mentioned in the contract, and the other terminus is when the building is finished; but in this case you have no such two termini, because here you cannot name any time which is the end of the period during which this 10*l.* a day is to accrue. The penalties only accrue where there has been a delivery of bills of lading after a delay, and they do not accrue where there has been an entire refusal to give any bill of lading. The penalty clause does not apply, but one reason might be that there is no basis upon which the amount of penalty can be measured; therefore I think the clause does not apply.

I ought to have said that there was no conversion out at Bilbao by the captain, because the plaintiffs' agents, Messrs. Ybarra & Co., only asked for these goods upon terms upon which they were not entitled to have them, and if the defendants' captain had some motive in his mind other than the right one, that does not vitiate his title, or make him less entitled to retain the goods under his true right to do so; and where a man is insisting upon two reasons, one of which is a right one, and the other of which

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is a wrong one—although I do not say that he insisted upon the wrong one here—the other party cannot say "because he has given a wrong reason he shall not have the benefit of the right one."

I have one further remark to make. I agree with my Lord Chief Justice that the captain was bound to sign a bill of lading. That means a bill of lading in the ordinary form, and not a bill of lading different from the ordinary forms, unless there is some special cause for his doing it, and there was none such here. He had no right to put in the stipulation, "The vessel not liable for duties on cargo caused by non-arrival before 1st July." It has been said that it was a nugatory stipulation for him to put in. Possibly it was, but a man has no right to put in a stipulation which is unusual, which may create difficulties and embarrassments, and which begs the question in his own favour, and then say, "There is no harm in it, therefore you ought not to object." In my opinion, the defendants' captain refused to sign the bill of lading that he ought to have signed, and therefore committed a breach of the contract. I cannot, however, trace any damage to the breach of contract on the part of the captain. The damages therefore must be nominal—I suppose a shilling; and as both parties are in the wrong, each party must bear his own costs of all proceedings in the action.

COTTON, L.J. I agree in the opinion that Bramwell, L.J., has expressed as to our jurisdiction.

I cannot but think that the argument on this point was founded on the fact, that there was a separate motion for a new trial, in addition to the appeal. We not long ago held that in such a case as this it was only necessary to appeal (1), and the cases already decided (2) merely came to this result, that where there had been either issues settled before the case was heard by the judge without a jury, or where the judge himself had had a thorough adjudication of the facts, and then a separate determination of the law applied to those facts, it was necessary to move within twenty-one days for a new trial, but where there was no such separate adjudication either on the issues beforehand, or a separate adjudi-

(1) *Potter* v. *Cotton*, ante, p. 137.
(2) *Krehl* v. *Burrell*, 10 Ch. D. 420; *Lowe* v. *Lowe*, 10 Ch. D. 432.

cation on the facts before the adjudication on the point of law, there only an appeal would lie. But when the appeal comes before us the Court of Appeal has the full right, if it thinks necessary, although there is no motion for a new trial, to say that the conclusion of fact arrived at is not satisfactory, and as they have not the materials before them to arrive at a proper conclusion, the Court will order a new trial, and I can instance a case where this would be done; where the question turns on the credibility of witnesses who had been heard vivâ voce, and seen by the judge who himself had tried the case. In such a case, even although the Court had thought the conclusion was not a correct one, they might direct that the case should go back for a new trial. Here the case is not one which turns on the amount of credibility to be given to the different witnesses, but on the conclusion of fact from certain letters, and from certain evidence which was taken upon commission. Under those circumstances, it is our duty to deal with the matter, and if we see before us the materials for arriving at a conclusion on the facts contrary to that which was arrived at by the learned judge, we ought not, in my opinion, to put the parties to the expense and delay of sending the matter back for a new trial. It is argued that such a course is hard as compared with the right of the suitor to a new trial who has had all his facts tried by a jury; but then the party who has insisted upon his right to a trial by jury, has that right which he cannot be deprived of by the Court. In the present case the plaintiffs by not requiring a jury, have submitted to the matter being tried by a judge, and afterwards by the judges of the Court of Appeal: they have waived their right, which the other party had not, to have the facts tried by a jury. Of course I need not say in all questions of fact, especially where there has been vivâ voce evidence before the judge in the Court below, the Court of Appeal ought to be most unwilling to interfere with the conclusion which the judge has arrived at when he has had the opportunity, which the Court have not, of seeing the witnesses, and judging of their demeanour. Fortunately in this case I cannot find that there were any, and certainly there were no separate issues of fact, or any separate determinations of fact to be tried. In the judgment of Lindley, J., there is no finding contrary to that

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which we have arrived at on the evidence. He draws a different conclusion, but I nowhere find in his judgment that he has found as a fact that Messrs. Ybarra & Co. were willing to pay full freight for the cargo delivered, and nowhere do I find that the master would have refused to deliver the cargo on tender to him of the freight without deductions. I have arrived at the conclusion that in consequence of the acts of the plaintiffs, Messrs. Ybarra & Co. were not ready to pay, except after making a deduction which the plaintiffs had requested them to make for the freight. In my opinion the master was perfectly right to refuse to deliver the cargo unless the freight was paid in full.

One word upon the question of conversion of the cargo. As I agree with the Lord Chief Justice, I will not discuss the case at great length. A contract was entered into to carry a cargo of coke to Bilbao. There is also in the contract a stipulation to give a bill of lading. The master wrongfully refused to give a bill of lading: he had the cargo on board under the contract to carry, and the refusal to give a bill of lading is said to amount to a conversion. The plaintiffs having given the master this particular cargo, did not object to his taking it to Bilbao to Messrs. Ybarra & Co., but objected to the master not giving a bill of lading; Messrs. Ybarra & Co. were perfectly ready to receive this cargo, subject to certain questions as to deduction. That, in my opinion, cannot be considered in any way a conversion.

The cargo was not taken to a person whom the plaintiffs did not intend to have it, as in the case of *Falke* v. *Fletcher* (1); nor was the document of title given to a person other than the plaintiffs so as to enable that other person to get the cargo, as in the case of *Hiort* v. *Bott*. (2) The present was merely the case of sailing away with the coke under a contract to a person who was intended to have it, without giving to the plaintiffs that which I agree the master was bound to give under the contract, and which might have been of use to the plaintiffs in dealing with the coke, but it was not a carrying it away to give it to a person against the will of the plaintiffs, or to give to some one else the means of obtaining the coke against the bill of lading. In my opinion there was no conversion in sailing away with the coke.

(1) 18 C. B. (N.S.) 403; 34 L. J. (C.P.) 146. (2) Law Rep. 9 Ex. 86.

THESIGER, L.J. I agree with Bramwell, and Cotton, L.JJ., as to the mode in which a case of this kind ought to shape itself before this Court. There may no doubt be cases in which a judge, trying an action by himself, without a jury, may deal with specific questions of fact in such a way that the finding upon those specific questions of fact may be separated from the judgment that he gives upon it. It appears that Order XL. in the latter part of rule 4 contemplates such a case, but, on the other hand, where a judge takes upon himself not to decide any specific question of fact separately, there the matter appears to be one of mixed fact and law, to be dealt with by this Court as it would have been before the old Court of Appeal in Chancery under similar circumstances upon appeal from a Vice-Chancellor. It appears to me that, with one exception, there was no necessity in a case of this kind for any motion for a new trial. That one exception relates to motions upon the ground of surprise. There I think it would be proper that a motion for a new trial should be made, although upon that motion it would be open to this Court not to send back the case to the judge who tried it, but, it might itself, instead of doing that, take the additional evidence, and so try the whole case.

With reference to the merits of this particular case, the Lord Chief Justice has so fully dealt with the facts and the law that, agreeing, as I do, with all the observations which he has made, I shall add but a very few words of my own.

The matter has to be looked upon with reference to two points, namely, the point of time at which the vessel left Cardiff, the place from which the goods were to be carried; the other point would be the moment at which the vessel left Bilbao, the goods having been deposited for the benefit of those whom it might concern. With reference to Cardiff, and the time at which the vessel left Cardiff, the matter appears to me to stand thus. I agree with Lindley, J., that there was a breach of the contract under the charterparty by reason of the captain refusing to give a bill of lading, unless in the bill of lading there was a clause which he was anxious to put upon the charterers; but, although I am of that opinion, I am equally of opinion that there was no conversion at Cardiff.

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Three cases have been cited as bearing upon this question, and those three cases appear to me to be excellent illustrations of what a conversion is, and also excellent illustrations that in this particular case there was no conversion.

The first was *Falke* v. *Fletcher*. (1) There there was a question with reference to certain goods that had been put on board a vessel, whether those goods belonged to the plaintiff, who had actually put the goods on board, or to a person named De Mattos, who had become bankrupt after the goods had been put on board: and it was held in fact and in law that the property in the goods remained in the plaintiff. On the other hand it was proved as matter of fact that, although the goods belonged to the plaintiff, and although he had demanded to have a bill of lading made out which would make the goods deliverable to him or to his order, the captain, having wrongfully asserted the title of De Mattos, refused to give a bill of lading, and carried away the goods. There, therefore, the act of the captain was held to be a conversion, not merely because he refused to give a bill of lading, but because he carried away the goods under such circumstances as shewed that he intended to assert that the title to them was in De Mattos and not in the plaintiff. No circumstances, therefore, could be clearer to indicate that there was a wrongful conversion, and that the action of trover was maintainable.

The second case was that of *Hiort* v. *Bott*. (2) There the defendant admittedly had no title to certain goods. He was anxious no doubt to do all that would be necessary to put the goods within the dominion of the persons who were really entitled to them, but unfortunately his acts were such as to assert a dominion in himself, because he signed a delivery order, which of course was an assertion of title and of a right to deal with the goods in himself. He indorsed that delivery order over to an agent no doubt for the purpose of appropriating them to the persons who were really entitled, but still the fact of indorsing the delivery order to the agent was that he was purporting to give a document of title to the agent. There the defendant was held to have been guilty of a conversion, he having exercised dominion over the goods.

(1) 18 C. B. (N.S.) 403; 34 S. J. (C.P.) 146. (2) Law Rep. 9 Ex. 86.

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The third case, *Peek* v. *Larsen* (1), was a case where a charterparty containing certain stringent terms had been entered into. A person shipped goods on board a vessel which was subject to the charter, but without any notice of the charter, and it was held there as matter of fact and law that he was not bound in any way by the terms of the charterparty. Under such circumstances, either the captain or the shipowner was bound to carry the goods without their being subject to the charterparty, or, at all events, if he refused to carry the goods except subject to the charterparty, he was bound to return them upon demand. He did neither, and having refused to return them upon demand, and carried the goods away, he was properly held liable as a converter of those goods.

But here under the charterparty the shipowner was bound to carry the goods, when they were loaded, from Cardiff to Bilbao, and, looking at the fact that the goods had been sold by the charterers to Messrs. Ybarra & Co., he was bound to deliver them to them, and the goods were carried in the ship from Cardiff without the smallest intention of appropriating those goods to anybody except the plaintiffs, or to those who held title under the plaintiffs.

The only remaining question is, there being a breach of contract at Cardiff but no conversion, was there a conversion at Bilbao, or, if not, what are the damages which reasonably flow from the wrongful breach of contract at Cardiff? I am clearly of opinion, for the reasons already given, that there was no conversion at Bilbao. I am equally clearly of opinion that there were no damages which were due to the breach of contract, and consequently that the plaintiffs can only recover nominal damages.

It is a question of fact entirely, and I think that there is a certain amount of difficulty in arriving at the true state of facts as they existed at Bilbao, but, drawing the best inference I can from the facts as proved, it appears to me that on the 4th of July the captain was perfectly ready to deliver these goods to Messrs. Ybarra & Co., who had contracted to buy them from the charterers, provided he got the full freight, and that the damage therefore has not flowed from the original breach of contract, but

(1) Law Rep. 12 Eq. 378.

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has flowed from the act of Messrs. Ybarra & Co., that act being, under the advice or under the directions of the charterers themselves, wrongly demanding that there should be a deduction.

COTTON, L.J. I wish to add that a motion for a new trial may be necessary where a party is dissatisfied with the judgment on the ground of surprise.

Judgment for plaintiffs; damages.

Solicitors for plaintiffs: *Popplestone & Beddoe, for Vaughan, Newport, Monmouthshire.*

Solicitors for defendants: *Lyne & Holman.*

Nov. 13.

[IN THE COURT OF APPEAL.]

SWAN *v.* BARBER.

Ship—Bill of Lading—Nominal Freight—Cargo on Ship's Account—Lien of Unpaid Vendor—Contract to pay Sum equivalent to substantial Freight—Evidence.

The plaintiff, being the owner of a ship called the *K.*, loaded her with wheat at P.; as the cargo was taken on the ship's account, freight at the nominal rate of 1*s.* per ton was inserted in the bill of lading, which contained the usual exceptions of perils of the seas. He sold the cargo whilst afloat to H. upon the terms that "freight" should be paid at the rate of 60*s.* per ton. H. sold his interest in the cargo, and it ultimately vested in the defendant, who bought the cargo on the same terms on which it had been sold to H. The *K.* on her arrival was ordered to Y., where she commenced to discharge her cargo: the defendant received it and paid large sums on account. The quantity delivered was less than that mentioned in the bill of lading by about seventy quarters. The plaintiff claimed "freight" at the rate of 60*s.* per ton upon all the cargo delivered; the defendant claimed to deduct 193*l.* on account of short delivery. At the trial the jury were of opinion that the short delivery arose from the excepted perils, and found for the plaintiff for the total sum claimed by him:—

Held, that although the plaintiff might not have a lien as shipowner, the cargo being taken on ship's account, nevertheless he had a lien as unpaid vendor; that from the defendant's conduct a contract by him might be implied to pay freight at the rate of 60*s.* per ton upon all cargo delivered, and that the finding of the jury for the plaintiff was right.

BY the indorsement on the writ of summons the plaintiff claimed 193*l.* 3*s.* 6*d.*, being the balance due on account of "freight on 621 tons, 8 cwt. 1 qr. 22 lbs. wheat, ex the *Koh-i-noor*, at 3*l.* per ton," and of "harbour dues on cargo."

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The action came on for trial at the Norfolk Winter Assizes, 1879, before Kelly, C.B., when the following facts were proved:—

The plaintiff was the sole owner of the barque *Koh-i-noor*, and in the month of December, 1876, a cargo of wheat was loaded on board of her at Portland, in Oregon, in the United States, for ship's account. The master signed bills of lading, which stated that the cargo was shipped by Balfour, Guthrie, & Co., of San Francisco, and consisted of 11,200 sacks of wheat "said to contain 1,427,222 lbs.," to be delivered in good order and condition "(all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order or its assigns: freight for the said goods payable in cash without discount at the rate of one shilling sterling per ton of 2240 lbs. gross weight delivered." On the 26th of April, 1879, during the voyage to England, the plaintiff sold the cargo consisting of about 2854 qrs. to Messrs. Hamilton, of Belfast, as per bill of lading, at the price of 65*s.* per 500 lbs., bill of lading weight, bags included, for cost free on board at place of shipment, including freight and insurance: "freight for United Kingdom to be reckoned at 60*s.* per ton." Messrs. Hamilton sold to Mr. Leigh, of Liverpool, and Mr. Leigh sold to Messrs. Moroney, of London, who were agents for the defendant. Except as to the price per 500 lbs., each contract was in the same terms, namely, that freight was to be reckoned at 60*s.* per ton, the object being to give the ultimate purchaser an extended period for payment of at least 1800*l.* The price of the wheat upon the sale by Mr. Leigh to Messrs. Moroney was 68*s.* per 500 lbs. By the invoice made out from Messrs. Moroney to the defendant it was stated that the price of "2854 $\frac{222}{500}$ qrs. at 68*s.* per 500 lbs." was 9705*l.* 2*s.* 2*d.*, "less freight on 637 tons 3 cwt. 0 qr. 6 lbs. at 60*s.* U.K., 1911*l.* 9*s.* 2*d.*," the balance of 7793*l.* 13*s.* being due on the 7th of July, 1877. The bill of lading and policy of insurance were handed to the defendant. During the voyage to England the *Koh-i-noor* met with bad weather, which caused her to labour and strain and become leaky: the water consequently got to the cargo. On her arrival at Falmouth she was ordered to Yarmouth to discharge. Upon reaching that port on the 16th of May, 1877, part of the cargo was delivered into lighters in the Roads and the residue in

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the harbour. A good deal of the cargo was damaged by sea-water owing to the bad weather which the ship had experienced, and other portions of it were heated: many of the bags containing the wheat were rotten from the effects of the sea-water, and in the result, although all the cargo taken into the ship, except what had been pumped up during the voyage, was delivered to the defendant, there was a short delivery of several tons, if the amount mentioned in the bill of lading was actually put on board. It was ultimately agreed that the weight of the cargo delivered was 621 tons 8 cwt. 1 qr. 22 lbs. Prior to the completion of the discharge two sums of 300*l.* and 1000*l.* had been paid on account of freight, a cheque for the latter sum having been sent by the defendant in a letter, dated the 31st of May, and saying, "We enclose cheque on account of freight per *Koh-i-noor;* please send a stamped receipt for same." After the delivery had been completed, an account was made out claiming "freight on 621 tons 8 cwt. 1 qr. 22 lbs. wheat, at 3*l.* per ton, 1864*l.* 4*s.* 10*d.*," and "harbour dues on cargo, 17*l.* 10*s.* 7*d.*;" these two sums making a total of 1881*l.* 15*s.* 5*d.* Credit was given for the two amounts of 300*l.* and 1000*l.*, and the balance alleged to be due was 581*l.* 15*s.* 5*d.* The defendant at first sent a cheque for 214*l.* 15*s.* 8*d.* in settlement of the claim for the balance of freight: he claimed to deduct the value of "290 sacks wheat short delivered, less freight as per original invoice at 3*l.* per ton," amounting to 193*l.* 3*s.* 6*d.*, and also "half freight on sea-damaged, 115 tons 17 cwt. 1 qr. 27 lbs. at 30*s.* per ton," amounting to 173*l.* 16*s.* 3*d.* The claim to deduct the latter amount was afterwards withdrawn by the defendant, and "full freight" upon the sea-damaged wheat was paid; but as he persisted in his refusal to pay the sum of 193*l.* 3*s.* 6*d.*, the present action was brought. The defendant, upon cross-examination, said: "I agree that the output was 621 tons odd, which equal 2784 qrs.: I was to pay 3*l.* a ton freight on that."

Kelly, C.B., in summing up the case to the jury, said that it seemed from the contract that 2854 qrs. were shipped at Portland, but on the voyage to England part of the cargo had heated, and part had been damaged by sea-water, so that upon discharging the vessel at Yarmouth the cargo was found to consist of only 2784 qrs. instead of 2854 qrs.: that the plaintiff could not recover

freight except for the number of quarters actually delivered, but that he was entitled to recover to that extent unless the defendant could make out a cross-claim to that amount. But by the bill of lading perils of the seas were excepted, and the question for the jury was, did the short delivery arise from the excepted perils? Unless the deficiency was thus caused, the defendant would be entitled to a set-off against the plaintiff; but if it did, the defendant's only remedy was against his underwriters.

The jury found a verdict for the plaintiff for 193*l.* 3*s.* 6*d.*

The Exchequer Division (Kelly, C.B., and Pollock, B.), having refused an application to set aside the verdict, the defendant obtained from this Court a rule nisi on the ground of misdirection.

Bulwer, Q.C., and *W. Graham*, shewed cause. It may be admitted for the plaintiff that much more than the freight mentioned in the bill of lading has been paid by the defendant; but this circumstance really tells very much against him. The plaintiff had, at least, a lien as unpaid vendor; and it is evident from the defendant's conduct that he was endeavouring to induce him to waive it. All the "freight" has been paid except so much as represents the value of the wheat, which the defendant alleges to have been shipped, but which was not delivered; and, upon the question of short delivery, the defendant is concluded by the finding of the jury. It may be true that "the vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for:" Benjamin on Sales, bk. 4, part 2, ch. 2, p. 567 (2nd ed.); but this doctrine must be taken subject to the qualification mentioned in a note to the above quoted passage: "The rule is less rigid where goods are ordered from a correspondent, who is an agent for buying them;" for this qualification *Ireland* v. *Livingstone* (1) is cited. In the present case the defendant, the ultimate purchaser, was bound to treat the plaintiff, the original seller, as his agent, and he could only demand that a quantity approaching that mentioned in the bill should be delivered to him. The plaintiff merely claims freight upon the number of quarters actually delivered.

Finlay, in support of the rule. The plaintiff, as shipowner, can

(1) Law Rep. 5 H. L. 395.

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recover only the freight mentioned in the bill of lading: *Keith* v. *Burrows*. (1)

[PER CURIAM: In that case the question was whether the mortgagee of a ship upon taking possession could be in a better position than the mortgagor.]

The plaintiff had no right of action against the defendant; there was no evidence of a contract by the defendant to pay "freight" at the rate of 60*s*. per ton; and if there had been, the defendant would have been entitled to claim against the plaintiff for short delivery. It is immaterial that the defendant might have a remedy against his underwriters.

JESSEL, M.R. When the facts of the case have been fully ascertained, it will be found possible to do substantial justice between the parties. The action was wrongly framed, if it be considered from a technical point of view; but the defect was capable of amendment. The plaintiff being owner of the ship *Koh-i-noor*, loaded her at Portland, in Oregon, with a cargo of wheat. The master signed bills of lading, but the rate of freight therein stated was merely nominal, namely, 1*s*. per ton. The plaintiff sold the cargo while it was still afloat to Hamilton, upon the terms that the freight should be reckoned at 60*s*. per ton; the effect of this contract was that part of the purchase-money should be retained for a time, and should be paid only when the wheat should have been delivered at the port of discharge. The purchaser sold again, but the new purchaser had, in effect, notice of the terms of the original sale, and he sold upon similar terms at least as to the freight to a third purchaser, who is the defendant in this action. Therefore a sum of money was kept in hand to be paid to the original owner of the cargo upon the right delivery thereof. But the plaintiff, as first vendor, had a lien which he was entitled to enforce. The ship was ordered round to Yarmouth; the defendant paid 1000*l*. and invited the master to complete the delivery of the cargo. All the so-called freight has been paid except a small amount, but the weight delivered was less than that mentioned in the bill of lading, and a quarrel arose as to this short delivery. The plaintiff said that the cargo was

(1) 2 App. Cas. 636.

diminished by reason of the escape of wheat from the bags, and that that loss was occasioned by the excepted perils of the seas, and as to this the jury found in favour of the plaintiff. It has been contended before us that the defendant did not contract to pay the so-called freight at the rate of 60*s.* per ton; but in my opinion, from the defendant's conduct a contract by him may be implied to pay freight at that rate for all the cargo capable of being delivered, in consideration that the plaintiff would waive his lien upon it. I think that the finding of the jury was right and ought not to be disturbed.

BRAMWELL. L.J. In this case as there was no contract of affreightment, no freight could be due. The shipowner was the owner of the cargo, he could not contract with himself. I say nothing about the 1*s.*, it is not material to consider it. The plaintiff wished to sell the cargo, and he found a purchaser willing to take it; but then arose the question as to payment of the carriage to England. If the plaintiff had been the owner of the cargo and another person the owner of the ship, it would have been necessary for the plaintiff to pay freight. When a contract is entered into for the carriage of goods by sea, freight is only payable if the cargo does arrive. In order that the plaintiff and the purchaser from him might be put in the position of the seller and buyer of the cargo carried in the vessel of a third person, the purchase-money was divided into two sums; one representing the value of the cargo at the port of shipment, the other the rate of freight if it had been carried in the ship of another owner. One of these sums is paid as the price of the cargo, the other remains in hand as if it represented a real freight. It is manifest to me that another shipowner would have a lien as to that sum, which would be due to him as a payment of freight; and in point of law no freight is due to the plaintiff, but part of the purchase-money which is to be taken in place of freight is due to him. I think that there was evidence of a short delivery, but it is not necessary to decide this, because the counsel for the plaintiff admitted it. The defendant bought the cargo afloat, and it is his misfortune that there is a deficiency. The policy of insurance was handed to him so that his remedy is against the underwriters. The plaintiff had

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a lien for the unpaid balance of the price against the purchaser from him, and he has the same right against the defendant as sub-vendee. The plaintiff would have a right to retain the goods until payment, and he did not lose that right because the purchaser has sold the goods. The plaintiff being in the position of an unpaid vendor can maintain the action upon a contract, that he should give up his lien and that the defendant should pay the balance of the price due for the goods delivered. The plaintiff is entitled to recover. It is not necessary to refer to any authority, and I need only remark that *Keith* v. *Burrows* (1) is not in point against the plaintiff.

BRETT, L.J. I am of the same opinion. The intermediate contracts had nothing to do with the plaintiff who had sold to Hamilton, and the question is what was Hamilton's liability? The purchase-money was divided into the price at the port of shipment and that which is called in mercantile language freight; it was not "freight," in the strict sense of the word, but it was a quasi freight. The plaintiff, having the cargo on board his ship, had a lien for the unpaid balance against Hamilton; it was a lien as unpaid vendor, not as shipowner. The defendant, however, had notice of it, and took delivery of the cargo; his conduct is conclusive evidence of a contract by him that he would pay the balance due upon the wheat delivered in consideration of the plaintiff waiving his lien. A contract of that kind is often entered into and is well known to the law. It is true that this is not a case of real freight, but only of quasi freight; the difference, however, seems to me immaterial.

Rule discharged.

Solicitors for plaintiff: *Storey & Cowland, for Charles Diver, Great Yarmouth.*

Solicitor for defendant: *George Lockyer, for W. R. Archer, Lowestoft.*

(1) 2 App. Cas. 636.

[IN THE COURT OF APPEAL.]

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POTTER *v.* COTTON AND OTHERS.

Practice—Appeal—Trial by Judge without a Jury—Motion for New Trial.

Where an action has been tried by a judge without a jury, if the unsuccessful party is dissatisfied with the judgment either on the ground that the judge has misdirected himself as to the law, or that his findings as to the facts are against the weight of evidence, the proper mode of obtaining relief is by appeal to the Court of Appeal, and not by motion for a new trial.

Krehl v. *Burrell* (10 Ch. D. 420) commented on.

ACTION commenced on the 9th of January, 1877, to recover possession of four houses.

In 1864, the defendant Cotton was the freeholder of some land situate at Fulham, Middlesex, and in April in that year he agreed with Davis to grant building leases of houses to be erected on it. In December, 1865, Davis, with the consent of Cotton, assigned to Harvey the benefit of the agreement. The agreement contained a clause empowering the defendant Cotton to re-enter for non-payment of rent, or upon non-performance of the agreement, or upon failure to erect the intended houses. By certain indentures of lease, dated December, 1865, the four houses sought to be recovered in the action, which had been erected on the land, were demised by the defendant to Harvey for the term of eighty years. The leases also reserved to the defendant Cotton a power to re-enter for non-payment of rent, and for breach of the covenants therein contained. In January, 1867, Harvey mortgaged the four houses to the plaintiff to secure the sum of 1000*l.* and interest: the mortgage debt was never paid off. In 1873, the defendant Cotton caused a writ of ejectment to be issued out of the Court of Queen's Bench against Harvey to recover possession of the piece of land mentioned in the agreement for building leases of April, 1864. Harvey did not appear, and judgment was signed, and possession given to Cotton. The alleged grounds for the ejectment were non-payment of rent and a breach of the covenant to repair.

The action was tried before Huddleston, B., without a jury, and the learned judge was of opinion that the judgment in the action

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of ejectment was conclusive against Harvey, and all persons claiming through him, and that the plaintiff was a privy in estate to Harvey. He therefore gave judgment for the defendants.

Bompas, Q.C. (*Nasmith*, with him), moved for a new trial on the ground that the finding of the judge was against the weight of evidence, upon the ground of misdirection, and upon the further ground that upon the foregoing facts judgment ought to have been entered for the plaintiff.

BRAMWELL, L.J. I am clearly of opinion that in this case the plaintiff ought to have appealed. The reasoning in *Krehl* v. *Burrell* (1) may seem to shew that the motion for a new trial is right: I cannot, however, agree with the judgment in that case: at all events the decision must be confined to cases, where at the trial of the action the facts are found separately, and judgment is reserved and is pronounced at a subsequent time. I wish to point out that a judge gives judgment, he does not give a verdict.

BRETT, L.J. Perhaps we are not at liberty to differ from *Krehl* v. *Burrell* (1); but that case is explained by *Lowe* v. *Lowe* (2), and it merely lays down this proposition that where, according to agreement, a judge finds facts and then reserves judgment, his finding upon the facts is an interlocutory proceeding, and can be questioned only by an application to the Court of Appeal made within twenty-one days. In my own view where a judge has tried an action without a jury, he is in the same position as a Vice-Chancellor was before the Supreme Court of Judicature Acts, 1873, 1875, and the party, who is dissatisfied with his judgment, and is desirous of disputing it, must apply to this Court by way of appeal. It is not necessary now to determine whether that appeal must be brought within twenty-one days or one year.

COTTON, L.J. In this case the ground of complaint is that the judge has wrongly dealt with the evidence. I think that except those cases where the circumstances are identical with those in *Krehl* v. *Burrell* (1), the party dissatisfied with a judgment pronounced after a trial without a jury, must dispute it by way of

(1) 10 Ch. D. 420. (2) 10 Ch. D. 432.

appeal and not by motion for a new trial. *Krehl* v. *Burrell* (1), as explained in *Lowe* v. *Lowe* (2), must be confined to those cases where there has been a separate trial of the issues of fact, and a separate decision of points of law: the issues of fact need not be formal. But the principle of that case is not to be extended to cases where the judge at the same time finds the facts in dispute between the parties, and applies the law to the facts found by him.

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Motion refused.

Solicitors for plaintiff: *Sympson, Warner, & Turner.*

THE ATTORNEY GENERAL *v.* DOWLING.

1880 *March* 23.

Revenue—Succession Duty—Predecessor—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 2.

A lunatic was tenant in tail in possession of land with remainder to his younger brother R., and his sister D. successively in tail. R. converted his estate tail into a base fee in remainder, and mortgaged his interest to secure debts of 124,000*l.* with a covenant to convey the fee simple to the mortgagees if he should become able to do so. The mortgage debt was more than the fee simple value of the land, and R. had no beneficial interest in the equity of redemption. For the benefit of all parties a compromise was entered into with the consent of the Lord Chancellor (as protector and in lieu of the lunatic under 3 & 4 Wm. 4, c. 74, s. 33), in pursuance of which R. and D. and the mortgagees all joined in deeds of settlement whereby they conveyed the land, subject to the estate tail of the lunatic but discharged from the mortgage, to trustees upon trust after the determination of the lunatic's estate to raise 37,000*l.* by sale or mortgage of the land and to pay that sum to the mortgagees, and subject thereto to hold the land to the use of D. for life with remainder to her sons successively in tail. This arrangement was carried out, and upon the death of the lunatic D. became tenant for life in possession, and upon her death the defendant, as her son, became tenant in tail in possession:—

Held, that the defendant derived his interest as successor from his mother D. and not from his uncle R., as predecessor, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, and was therefore liable to duty at 1*l.* per cent. and not at 3*l.* per cent.

THIS was an information claiming succession duty, of which the material parts were as follows:—

By indentures of lease and re-lease, dated the 30th of Sep-

(1) 10 Ch. D. 420. (2) 10 Ch. D. 432.

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tember and the 1st of October, 1800, the Llantarnam Abbey estate was conveyed to trustees to the use of Edward Blewitt for life, with remainder to the use of his first and other sons successively in tail male with remainder to the use of his daughters as tenants in common in tail. Edward Blewitt died on the 1st of March, 1832, leaving two sons, Edward Francis, the elder, and Reginald James, and one daughter, Frances Mary Ann. Edward Francis thereupon entered into possession of the estate, but in April, 1832, was by inquisition found a lunatic. By indentures of lease and re-lease of the 15th and 16th of May, 1834, duly enrolled pursuant to the Fines and Recoveries Act, Reginald James granted and re-leased the Llantarnam Abbey estate to a trustee to hold the same, subject to the estate in tail male of Edward Francis, to the common uses to bar dower in favour of Reginald James his heirs and assigns. In June, 1834, Frances Mary Ann married Richard Brinsley Dowling, and by an indenture dated the 13th of June, 1834, in contemplation of the marriage, she and her future husband covenanted to settle any real estate which she or he in her right should, during the marriage, acquire, to her separate use for her life, and after her decease to her husband's use for life, with remainder to the use of the first and other sons of the marriage successively in tail male. The defendant was the only son of that marriage. Reginald James became indebted to the Monmouthshire and Glamorganshire Banking Company, hereinafter called the bank, in 124,000*l.*, which he secured to the bank by mortgage of his interest in the Llantarnam Abbey estate, with a covenant to convey the fee simple absolute if and when he was able to do so. (1) In 1852 the bank was, under an order of the Master of the Rolls, wound up and official managers appointed. In May, 1855, an agreement in writing was made between the official managers, Reginald James, and Frances Mary Ann Dowling and her husband, whereby—after reciting among other things that Lord Brougham in 1834 (see *In re Blewitt* (2)) and Lord Lyndhurst in 1835, had respectively refused their consent to petitions by Reginald James to enlarge his base fee into a fee simple absolute, and that it was considered

(1) This covenant was not stated in the information, but its existence was admitted by counsel on the argument.

(2) 3 My. & K. 250.

doubtful whether the estate tail in remainder of F. M. A. Dowling was bound by the covenant to settle after-acquired property contained in her marriage settlement—it was agreed that the parties to the agreement should all join in conveying the estate to trustees for an estate in fee simple absolute, subject only to the estate in tail male of Edward Francis, the lunatic, but freed and discharged from the securities of the official managers upon trust after the decease of the lunatic, in case he should die without leaving issue male, to raise 35,000*l.* and pay the same to the official managers, and subject thereto to settle the estate upon the trusts of F. M. A. Dowling's marriage settlement. In November, 1855, a petition was presented by Reginald to the Lord Chancellor as protector of the settlement and in lieu of the lunatic, to consent to a disposition of the estate upon the terms of the above agreement. The case is reported: *In re Blewitt.* (1) Under an order dated the 26th of February, 1856, made by the Lord Chancellor Cranworth and the Lords Justices sitting in Lunacy, their Lordships consented to Reginald James barring his estate tail and the remainders over for the purpose of enabling the estate to be settled to the uses and upon the trusts of the two deeds next mentioned, dated the 29th of February, 1856.

By one of them made between, 1, the official managers of the bank, 2, Reginald James, 3, Frances Mary Ann Dowling and her husband, and, 4, certain trustees, and duly acknowledged by F. M. A. Dowling and enrolled pursuant to the Fines and Recoveries Act, it was witnessed that—in pursuance of the order of the 26th of February, 1856, and to the intent that the base fee in remainder acquired by Reginald James by the deeds of the 15th and 16th of May, 1834, might be enlarged into an estate or estates in fee simple absolute, subject only to the estate or estates in tail male of Edward Francis (the lunatic), and that every estate tail or in tail male of Reginald James and F. M. A. Dowling and her husband in her right respectively, and all remainders, reversions, estates, and interests to take effect after the determination or in defeasance of the base fee or the estate tail or in tail male of Reginald James and F. M. A. Dowling and her husband in her right respectively, might be absolutely barred and extinguished—

(1) 6 D. M. & G. 187.

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the parties of 1, 2, and 3, with the consent of the Lord Chancellor and Lords Justices, conveyed to the trustees the Llantarnam Abbey Estate for an estate in fee simple absolute, subject only to the estate in tail male of Edward Francis, but freed and absolutely discharged from the securities of the bank, and from all right or equity of redemption of Reginald James, upon trust after the determination of the estate in tail male of Edward Francis either by his death without issue male living at his decease or by failure of issue male within twenty-one years after his death, by sale or mortgage of the hereditaments or any part thereof to raise 37,000*l.* and interest and certain costs, and to stand possessed of the same when raised upon trust for the official managers of the bank, and subject thereto to convey the estate to the uses declared by an indenture of even date.

By an indenture of even date, being the indenture last referred to, made between 1, the official managers of the bank, 2, Reginald James, 3, F. M. A. Dowling and her husband, 4, and 5, certain trustees, it was declared that the trustees of the 4th part should stand seised of the hereditaments subject to the estate in tail male of Edward Francis, and to the raising of the 37,000*l.* and interest and costs, upon trust to convey the same or such parts as should not have been absolutely sold under the trusts of the last stated indenture, and subject to any incumbrances which might have been created thereunder, to the trustees of the 5th part upon trust during the life of F. M. A. Dowling for her separate use, with remainder to the use of her husband during his life, with remainder to the use of the sons of F. M. A. Dowling by R. B. Dowling successively in tail male, with remainder to the use of the daughters in tail, with remainder to the use of F. M. A. Dowling in fee.

Edward Francis died in 1868 unmarried, and F. M. A. Dowling then entered into possession of the estate. The 37,000*l.* were duly raised by the trustees and paid to the official managers. R. B. Dowling died in 1859, and F. M. A. Dowling died in 1875, whereupon the defendant, as her eldest son, entered into possession of the Llantarnam Abbey estate.

The information prayed a declaration that the defendant was chargeable with duty at 3*l.* per cent. as on a succession derived

from his uncle Reginald James, as predecessor, or with duty at some other rate.

The answer of the defendant alleged that the fee simple of the estate was not in 1855, and (as the defendant believed) was not now worth the amount charged by Reginald James on his base fee in remainder expectant on the determination of the estate tail of Edward Francis, and Reginald James had not then any beneficial interest in the estate, and that the real nature of the compromise entered into in 1855 was that the defendant's mother, F. M. A. Dowling, purchased the estate for money or money's worth from the official managers, as mortgagees of Reginald James, and settled it in pursuance of her marriage settlement; that the defendant derived his succession from his mother as his predecessor, and not from his uncle Reginald James; and that he had offered to pay duty at 1*l.* per cent. accordingly.

March 8. *Sir H. Giffard, S.G.*, and *W. W. Karslake*, for the Crown. The real settlor was Reginald. At the moment before the execution of the deeds of the 29th of February, 1856, he had an equity of redemption in his base fee, and he had also a power given him by s. 19 of the Fines and Recoveries Acts, 3 & 4 Wm. 4, c. 74, of converting his base fee into a fee simple absolute. That power could not be exercised during the life of Edward Francis, the lunatic, without the Lord Chancellor's consent, but if the lunatic died without issue, Reginald could have converted the base fee into a fee simple absolute without any one's consent. In *re Blewitt* (1) the Court treated the settlement as one made by him. Mrs. Dowling and her husband were made parties because of the doubt which had arisen whether her estate tail in remainder was included in her marriage settlement, and if she had any interest after the determination of Reginald's estate, it was, as a matter of conveyancing, thought right that she and her husband should convey. They executed the deed as conveying as well as receiving parties, but the settlement would have been equally good if they had not been parties. Defendant's estate came out of his uncle Reginald's estate, and not out of any estate which his mother had. The very point has been determined in favour of

(1) 6 D. M. & G. 187.

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the Crown in *Lord Advocate* v. *Earl of Glasgow*. (1) The Lord Chancellor, as protector of the settlement, was no doubt influenced in giving his consent by the fact that Mrs. Dowling assented, but that is not enough to make her the predecessor. In *Attorney General* v. *Lord Braybrooke* (2), Lord Chancellor Campbell held that the protector of a settlement giving his consent to a disposition of property cannot be treated as a creator of such disposition.

Southgate, Q.C., and *Jason Smith*, for the defendant. The "predecessor" under s. 2 of the Succession Duty Act (3), is the settlor. Mrs. Dowling, the defendant's mother, was the settlor: she provided the 37,000*l.*, and was in fact the purchaser for the benefit of all entitled under her marriage settlement. The ultimate trusts in fee are in favour of her, and no one ever heard of the ultimate trusts in fee being in favour of any one but the settlor. If the lunatic had survived Reginald, and died without issue, Mrs. Dowling would have succeeded to the estate without paying anything, and that contingency she gave up by consenting to this settlement. Without her assent the Lord Chancellor would never have consented. The true principles of construing the Act are clearly laid down in the judgment of Jessel, M.R., in *Fryer* v. *Morland* (4), where he cites *In re Jenkinson* (5) and *Attorney General* v. *Baker* (6), and shews that the object of the Act is "to grant a duty on successions to property by persons succeeding to estates by gratuitous title," and that a person who

(1) 12 Scottish Law Reporter, 215, 217, 218.

(2) 9 H. L. C. 150.

(3) Sect. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51): "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

(4) 3 Ch. D. 675, 681–684.

(5) 24 Beav. 64.

(6) 4 H. & N. 19.

bonâ fide purchases for money the estate of some one else, derives his interest not from the vendor but from his own money with which he buys.

Sir H. Giffard, S.G., in reply. *Fryer* v. *Morland* (1) would be in point if the Crown were claiming duty on the 37,000*l.* If this was a bonâ fide purchase by Mrs. Dowling, no doubt the defendant's contention would be right, but the 37,000*l.* was raised upon the estate. The covenants for title were entered into by Reginald, and not by Mrs. Dowling.

Cur. adv. vult.

March 23. The following judgments were delivered:—

KELLY, C.B. I am of opinion that the defendant is entitled to the judgment of the Court, on the ground that he claims under his mother, Mrs. Frances Mary Ann Dowling, who became entitled to the Llantarnam Abbey estate, not under any settlement by Reginald James Blewitt, or any other person, but under a purchase from the managers of the Monmouthshire Company, who had purchased the whole estate of Reginald; the purchase having been effected in consideration of the sum of 37,000*l.*, which, with the consent of Mrs. Dowling, was raised upon the estate; the result of which was, that the estate in reversion upon the determination of the estate tail of the lunatic, by his death without issue, passed to Mrs. Dowling, charged with the sum of 37,000*l.*, which, as it is said, has since been paid by her, or the defendant, or, if not paid, which must be paid by the defendant, as the purchase money of the conveyance of the estate to Mrs. Dowling. And although Reginald Blewitt was of necessity a party to the deeds under which this conveyance was effected, he had no interest in the estate, and could not, therefore, settle it upon the Dowlings, or any other person or persons, he having parted with his interest to the Monmouthshire Company, who afterwards conveyed to the managers who became the parties, and the only parties, conveying, and having power to convey the estate to the Dowlings, and to whom the purchase money of 37,000*l.* has been or must be paid by the Dowlings, under and according to the terms of the conveyance.

(1) 3 Ch. D. 675.

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To prove that such is the real nature and effect of the deeds of the 29th of February, 1856, it is necessary to consider only the real condition of the several parties to those deeds, and their respective interests in the estate. First: Reginald Blewitt, at the time of the execution of the deeds, had ceased to possess any interest whatsoever in the estate. He had, before, converted it into a base fee, but he had mortgaged the property to the Monmouthshire Company, from whom it had passed to the managers, for 124,000*l.*; and if the estate had been dealt with immediately before the execution of the deeds, it must have been sold, and upon the sale the purchase money received by the managers of the Monmouthshire Company, unless it had produced more than 124,000*l.* But, immediately upon the execution of the deeds of the 29th of February, 1856, the estate passed, subject to the death without issue of Francis, the lunatic, and subject to the charge of 37,000*l.*, and certain expenses incurred in raising that sum, for life to Mrs. Dowling, with remainder to Richard Brinsley Dowling, the present defendant. This appears clearly and indubitably from the provisions of the deed (par. 24), by which the several parties to the deed, with the consent of the Lord Chancellor and Lords Justices, conveyed the estate to the trustees and their heirs in fee simple, subject only to the estate tail in Edward Francis Blewitt, "but freed and absolutely discharged from the before recited securities of the Monmouthshire Company, *and from all right or equity of redemption of Reginald James Blewitt:*" in trust with all convenient speed after the determination of the estate of the lunatic, by sale or mortgage of the estate to raise 37,000*l.*, and a further sum for certain expenses to be incurred; and then to stand possessed of the sum, when raised, for the benefit of the managers of the Monmouthshire Company, and subject thereto, upon trust to convey, settle, and assure the same estate upon trust, as declared by the other deed (par. 25), that is to say, to Mrs. Dowling for life, to her separate use, with remainder to her sons and daughters in succession in tail male; in other words, to Richard Brinsley Dowling, the present defendant.

What, then, is the substance of this entire transaction? The Monmouthshire Bank, and afterwards the managers who were the mortgagees of the estate for 124,000*l.*, compromised their claim

upon the estate being charged for their benefit with 37,000*l.* Reginald had ceased to possess any interest whatever in the estate; for, first it was mortgaged to the bank for 124,000*l.*, though he still retained the equity of redemption, which it is obvious, however, was valueless. But by the deeds he expressly parted with the equity of redemption, and with all other interest that he had possessed, or could thereafter possess in the estate, in consideration of the bank, and afterwards the managers, releasing him in effect from the large debt of 124,000*l.*, and compromising it for a charge upon the estate of 37,000*l.* He therefore gave up all that he ever had possessed, and all that he ever could possess, by the execution of the deeds. The managers gave up their claim to 124,000*l.*, in consideration of the charge upon the estate of 37,000*l.*, to which they would become, as they have since, in fact, become entitled. And this sum of 37,000*l.*, thus charged upon the estate, and so diminishing its value by that amount, has been paid or must be paid by the Dowlings, into whose possession the estate passed, immediately upon the death of the lunatic without issue. On the other hand, the Dowlings, whose consent to and participation in the arrangement was made the condition by the Lord Chancellor of his authorizing and giving effect to the arrangement at all, gave up their right of succession, under the entail, upon the deaths of the lunatic and of Reginald Blewitt without issue and without having barred the subsequent entails; but they also agreed to take the estate, if they should become entitled to take it at all, under the deeds charged with the debt of 37,000*l.* and upwards, and which, as already observed, the defendant has paid or is liable to pay. All the parties were open to the risk of the lunatic recovering from his insanity, and converting his estate tail into a fee, or marrying and having issue; and to the risk, likewise, of his surviving one, or more, or all of them. It was therefore manifestly to the interest of the bank and managers to agree to the compromise, and execute the deeds, in order to obtain the sum of 37,000*l.*, which, without the consent of the other parties, they must lose altogether. So, it was obviously to the interest of Reginald Blewitt that he should agree to the compromise, in order to be free from a debt of 124,000*l.*, which he had not the chance of being ever able to pay. And

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with respect to the Dowlings, without whose consent the Lord Chancellor never would have sanctioned the compromise at all, they were content to sacrifice upwards of 37,000*l.*, and take the estate subject to a charge to that amount, which, sooner or later, they must pay in order to obtain the estate, as they did obtain it, upon the death of the lunatic. And this compromise, as it affected all the parties to it, was expressly sanctioned and approved by the Lord Chancellor. It is clear, therefore, that the effect of this compromise was not a settlement by Reginald upon the Dowlings, but a purchase by the Dowlings, not of Reginald but of the bank or of the managers, for upwards of 37,000*l.* Being, then, a purchase, and not a purchase of the alleged settlor, but of his vendees, the managers of the bank, by the Dowlings, who have paid the price of upwards of 37,000*l.*, or become liable to pay it, it is not a settlement at all but a purchase for a valuable consideration. And it comes directly within the authority of the case of *Fryer* v. *Morland*. (1) The marginal note is this:—"A conveyance or assignment by way of bonâ fide sale does not create a succession within the meaning of the Succession Duty Act, 16 & 17 Vict. c. 51. Where the purchaser of a reversionary life interest in settled property had contracted to sell it to D., the tenant for life in possession, in consideration of a sum of money paid down and a further sum payable on the death of D., secured by a charge on the reversion—Held, that there was no succession created within the meaning of sect. 2 of the Act, and that no duty would be payable on the death of D. in respect of the said charge."

Upon these grounds I am of opinion that the defendant does not take this estate under a settlement by Reginald Blewitt as a predecessor or otherwise, but that he takes it in succession to his mother, Mrs. Dowling, who took the estate by purchase for a valuable consideration and not of Reginald Blewitt at all, but of the managers of the bank.

HAWKINS, J. The question in this case is, whether the defendant became possessed of the Llantarnam Abbey property on a succession derived from his uncle Reginald Blewitt, or on a

(1) 3 Ch. D. 675.

succession derived from his mother Frances Dowling. In the former event he is liable to the succession duty of three per cent. claimed by the Crown. In the latter to one per cent. only —which sum he is willing to pay.

By the Succession Duty Act (16 & 17 Vict. c. 51), s. 2, it is provided that every "disposition" of property by reason whereof any person has or shall become beneficially entitled to any property upon the death of any person shall be deemed to confer on the person entitled by reason of such disposition "a succession." Did the defendant then succeed to the property upon a "disposition" of his uncle or of his mother?

The material facts are by no means complicated, and for the purposes of the present case it will be sufficient to commence with a settlement of the property by Edward Blewitt, the defendant's grandfather, in the year 1800. By indentures of lease and release dated respectively the 30th of September, and the 1st of October, 1800, Edward Blewitt conveyed the Llantarnam Abbey property to trustees, inter alia, to the use of himself Edward Blewitt for life, with remainders to his first and other sons in tail male, with remainder to his daughters in tail general. Edward Blewitt died in 1832, leaving two sons, Edward Francis Blewitt (a lunatic), and Reginald Blewitt, and a daughter Frances, who afterwards became the wife of Richard Brinsley Dowling, and by him the mother of the defendant. On the death of Edward Blewitt, Edward Francis, his lunatic son, became possessed of the property as tenant for life in tail male. In May, 1834, by indentures of lease and release, Reginald Blewitt conveyed the property to a trustee in fee, to hold the same (subject, inter alia, to the life estate of Edward Francis Blewitt, the lunatic), to the use of himself the said Reginald Blewitt, his heirs and assigns, thus creating in himself a base fee in remainder expectant upon the estate in tail male of his lunatic elder brother.

After May, 1834, Reginald Blewitt mortgaged his base fee to the Monmouthshire and Glamorganshire Banking Company (called hereafter "the bank"), for 124,000*l.*, with a covenant, in the event of his future ability so to do, to convey to them also by way of mortgage the absolute fee simple. The sum for which the property was so mortgaged was in excess of its full fee simple

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value, so that Reginald Blewitt's equity of redemption was valueless. In 1852 the bank was wound up and official managers appointed whom I will still call "the bank." In June, 1834, Frances Blewitt married Richard Brinsley Dowling, having immediately before and in contemplation of such marriage covenanted with trustees to settle any real estate which she in her own right should during the continuance of her marriage acquire, to her own use during her life, with remainder to her intended husband during his life, with remainder to the first and other sons of that marriage in tail male. Reginald Blewitt Dowling, the defendant, may (for the purposes of this case) be treated as the only issue of that marriage.

Before referring to the subsequent arrangements and dispositions of the property in 1855 and 1856, it will be convenient shortly to consider the position of all parties immediately before such arrangements and dispositions were made. The lunatic Edward Francis Blewitt was in possession as tenant for life in tail male. Reginald Blewitt was next in succession, but he had so mortgaged his estate in remainder that he had no longer any beneficial interest in it, and was moreover incumbered with a personal liability for 124,000*l*. "The bank" had advanced that sum upon the security of Reginald's interest. If he died in the lifetime of the lunatic without acquiring a fee simple absolute that security would vanish. Frances Dowling (defendant's mother) and her issue were under the settlement of 1800 next in succession to her brother Reginald Blewitt, but their possession of the property was contingent upon the deaths of Edward Francis (the lunatic) and Reginald without male issue, and upon the non-barring of the estate by Reginald. If once Reginald acquired an estate in fee simple absolute, all the hope of Frances Dowling would be at an end, for the bank mortgage would absorb everything.

In this state of uncertainty all parties, save the lunatic whose life estate was unaffected, were naturally anxious for some arrangement by which each might acquire and secure to him or herself some certain definite advantage. First, Reginald to relieve himself from a load of personal debt; secondly, the bank to obtain certain payment of a portion of that which was owing to them in lieu of the very uncertain security they held for the whole of it;

thirdly, Mrs. Dowling to obtain certain and immediate possession (subject to the life estate only of the lunatic) of a property which possibly, in the then existing circumstances, might never become hers at all, though if it did it would no doubt come to her free from the incumbrances which Reginald had endeavoured to heap upon it. To acquire and secure this certainty Mrs. Dowling was willing to allow the fee simple of the property to be absolutely charged with a sum of 37,000*l.* to be paid to the bank. The bank were willing to accept that sum in satisfaction of their claim, and Reginald was willing to make a legal conveyance of his valueless equity of redemption.

By a document in writing dated the 1st of May, 1855, to which the bank, Reginald Blewitt, and Mr. and Mrs. Dowling were parties, an arrangement, in substance such as that I have referred to, was made, but it needed the consent of the Lord Chancellor, who was protector of the existing settlement of 1800 (the tenant for life being a lunatic) before it could be carried into execution. His lordship thought the proposed arrangement reasonable, and gave his assent to it accordingly. The arrangement so approved was carried out by two deeds, each bearing date the 29th of February, 1856. Upon the true effect and construction of these deeds the question before us depends.

By the first of them Reginald Blewitt, Mr. and Mrs. Dowling, with such consent as aforesaid, and the bank, conveyed the Llantarnam Abbey property to trustees for an estate in fee simple absolute, subject to the estate in tail male of the lunatic, discharged of the mortgages of the bank and the equity of redemption of Reginald Blewitt, upon trust, immediately after the determination of the estate of the lunatic, by sale or mortgage of the property to raise 37,000*l.*, and to stand possessed thereof for the benefit of the bank, and subject thereto to convey the estate to the uses and upon the trusts declared by the indenture next mentioned.

By the second of such indentures of the 29th of February, 1856, it was declared that the trustees named in the first indenture should (subject as in that indenture mentioned) stand seised of the said Llantarnam Abbey property to the use of other trustees (named therein) during the life of Mrs. Dowling, upon trust for

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her separate use with remainder to the use of her husband for life, with remainder to the use of the first and every other son of the said Frances and Richard Dowling in tail male, &c. The lunatic Edward Francis Blewitt died in 1859 without issue. The father of the defendant died in February, 1868, and his mother in 1875, and thereupon he entered into possession of the property. Reginald Blewitt is still living.

Under these circumstances it is that the question arises whether the defendant succeeded to the property upon the disposition of Reginald Blewitt, or of Mrs. Dowling his mother. After carefully considering the matter, and not without hesitation, I have arrived at the conclusion that the defendant derived his succession from his mother, Mrs. Dowling, and not from his uncle Reginald.

It was contended for the Crown that the arrangement of 1856 ought to be treated as a disentailing and re-settlement of the property by Reginald. It was argued, moreover, that the consent of Mrs. Dowling, without which the Lord Chancellor would, as protector of the settlement, have refused his assent, was an immaterial circumstance, for that it in no way operated nor could operate as a disposition of the property by Mrs. Dowling, but that the re-settlement of the property emanated from Reginald, in whom alone was vested (subject to the life estate of the lunatic the mortgages to the bank, and the consent of the Lord Chancellor), the power to make such new disposition. And this is true enough. In *Lord Braybrook's Case* (1) Lord Campbell, L.C., said: "It cannot be argued that a person whose consent is necessary to a disposition of property, makes that disposition." And the language of the consent as set forth in the 22nd paragraph of the information is sufficient to shew that in form the disentailment and conveyance to new uses of the property could only proceed from Reginald Blewitt. He was an essential party to the conveyance to the new uses; so also was the bank to the extent of the interest it had acquired from him. Mrs. Dowling however was no necessary party to that conveyance; her consent, it is true, was required by the Lord Chancellor before he would sanction the barring of the entail, but that consent had no legal operation.

In form, therefore, the conveyance to the new uses was a

(1) 9 H. L. 166.

disposition by Reginald Blewitt and the bank. We have not, however, to deal with the mere form, but the substance and true nature of the transaction. This brings me to consider what I deem, apart from technical language, to be the substantial question in this case, viz., whether the estate which the defendant took upon the death of his mother was in substance and reality purchased by her for good consideration; or whether, to adopt the language of the Master of the Rolls in *Fryer* v. *Morland* (1), he succeeded to it by gratuitous title under a disposition made by his uncle Reginald. I think the true answer is, that the property was purchased by Mrs. Dowling for good consideration, such purchase being carried out by the deeds of 1856. The expression of this opinion naturally gives rise to two inquiries:

First: What were the subject-matters of the purchase? Secondly: What was the consideration given for it by Mrs. Dowling?

To the first, my answer is, the life estate of Reginald Blewitt, the interest of the bank as mortgagees, the release of Reginald Blewitt from an overwhelming personal debt, and the certain possession of an estate which but for the arrangement probably would never have come to her at all, for her possession depended on many contingencies which I have pointed out.

To the second inquiry my reply is, that Mrs. Dowling, who if the property had ever come to her as one of those entitled in remainder under the settlement of 1800, would have been entitled to it as a gratuitous succession free from all incumbrances created by Reginald, and might have altogether ignored the claim of the bank, was content to forego her right in that respect, and consented to saddle the estate, or allow it to be saddled, with an absolute charge of 37,000*l.* as the consideration for the certain acquirement by her of those valuable subject-matters of the purchase to which I have just adverted, and this consent it was which induced the Lord Chancellor to sanction and approve of the deeds under which the defendant has now succeeded to the property. To put it shortly, in substance she agreed to purchase the life estate of her brother Reginald, his equity of redemption, the interests of the bank, her brother's freedom from debt and (subject to the lunatic's life estate) the immediate and certain

(1) 3 Ch. D. at p. 681.

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possession of the property; and as a consideration she agreed to forego any contingent right she might have to possess the property free from incumbrances; and consented that it should be absolutely charged in fee with a sum of 37,000*l.* This consent, it must be observed, might very well be a valuable consideration for a contract of purchase though of no operation whatever as an actual disposition of the property.

I think this case falls directly within the principle upon which the Master of the Rolls acted in the case of *Fryer* v. *Morland* (1), upon which the defendant relied in the argument before us. In substance the transaction amounted to a purchase by Mrs. Dowling and an alienation by Reginald Blewitt of the fee simple (subject to the estate of the lunatic) for valuable consideration, and the conveyance to the uses mentioned in the deed of the 29th of February, 1856, must be looked at as though she, having purchased the fee simple, had directed it to be conveyed at once and direct by the vendor to the uses declared, instead of going through the form of first taking a conveyance to herself and then settling it as it was settled by the deed of the 29th of February, 1856.

For these reasons, I am of opinion that the defendant took upon a succession from his mother Mrs. Dowling, and not from his uncle Reginald Blewitt, and that he is entitled to our judgment.

Judgment for the defendant.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *R. S. Taylor & Son.*

(1) 3 Ch. D. 675.

WILSON AND ANOTHER *v.* WALLANI AND OTHERS. 1880

March 2.

Bankruptcy—Leaseholds vest in Trustee on Appointment—Disclaimer—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 17, 23, 24—*General Rules*, 1871, *r.* 28.

Under the Bankruptcy Act, 1869, ss. 17, 23, 24, the leaseholds of a liquidating debtor vest in the trustee on his appointment, subject to his power of disclaimer; and if there is no valid disclaimer the trustee is personally liable for the rent accruing due after his appointment and on the covenants of the lease.

A disclaimer in writing signed by the trustee's solicitor is not a valid disclaimer "by writing under the hand" of the trustee within s. 23.

Per Stephen, J.

THE action came on for trial before Stephen, J., and a jury in Middlesex, when the jury were discharged and the questions left to the learned judge, and the case was heard on further consideration in December, 1879. The facts and arguments appear in the judgment.

H. Matthews, Q.C., and *Horne Payne*, for the plaintiffs.

Ambrose, Q.C., and *E. G. Man*, for the bankrupt's trustees, defendants.

March 2, 1880. The following judgment was delivered by

STEPHEN, J. This was an action brought by the landlords of a house, No. 32, Alfred Place, Bedford Square, against Wallani, who was the tenant under an agreement dated the 25th of December, 1876; against various persons to whom Wallani had sublet, and who need not be mentioned; and against Auguste Dumert and Cæsar Demaux, who were the trustees of Wallani under proceedings in the Court of Bankruptcy, by which it was determined that Wallani's affairs should be arranged by liquidation. The action was brought to recover the possession of the house, arrears of rent, damages for non-repair, and damages for use and occupation.

At the trial it was arranged that possession of the house should be given up to the plaintiffs, that 40*l.* should be agreed upon as the damages in respect of want of repair, and that I should decide on further consideration whether Wallani or his trustees were

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liable upon the covenant to repair or for the rent, under the following circumstances:—

On the 23rd of December, 1876, the plaintiffs let the house to Wallani for three years, with covenants to repair and against subletting, and a proviso for re-entry. On the 18th of February 1878, Wallani's affairs were in liquidation and a resolution was passed appointing Dumert and Demaux his trustees. On the 5th of March, 1878, the trustees (who had previously put a man named Boden in possession of the house) sent a cheque for 22*l.* 10*s.* to the plaintiff's agent in payment of a quarter's rent left unpaid by Wallani, but due at Christmas, 1877. In the course of the month of March, 1878, a sale was, by consent of the plaintiffs, held on the premises by the trustees. The rent due on the 25th of March, 1878, was also paid by the trustees, but no rent has since that date been paid. Wallani continued to live in the house and sublet parts of it to various persons subsequently to March, 1878. There was no evidence that after the payment of the Lady Day rent the trustees interfered with the house in any way whatever. On the 1st of November, 1878, the plaintiffs issued a writ against Wallani and his subtenants, but not against the trustees. On the 12th of December, 1878, the plaintiffs' solicitor wrote a letter to the solicitor to the trustees, in which he said: "My object in writing is to ask you to elect on behalf of your clients, whether you will disclaim the lease, otherwise I must apply at chambers to add you as defendants:" and on the 20th of December he repeated the question in another letter. On the 24th of December Mr. Swaine, the solicitor for the trustees, wrote to the plaintiffs' solicitor the following letter:—

"Dear Sir,—Re Wallani,—I have seen my clients on this matter. I was under the impression that the debtor had made arrangements with his landlord for the purpose of continuing as tenant.

"My clients did, I believe, disclaim the lease of 32, Alfred Place, but if I am mistaken, please accept this as such on their behalf.—Yours faithfully,

"C. A. Swaine."

On the 28th of December two letters, signed in the name of the plaintiffs' solicitor by his clerk, were addressed, one to Mr.

Dumert, one of the trustees, saying, "I am in receipt of your letter of the 24th inst., for which I am obliged;" the other to Mr. Swaine, saying, "I am in receipt of your letter disclaiming lease of No. 32, Alfred Place, Bedford Square, on behalf of the trustees of the above-named debtor."

On the 2nd of January, 1879, the plaintiffs' solicitor called the defendants' solicitor's attention to Rule 28 of 1871, and said that the leave of the Court to disclaim their interest in the lease was necessary. Further correspondence on the subject took place, which it is unnecessary to refer to specifically. The result was, that the application for leave to disclaim was made on behalf of the trustees on the 27th of January, 1879, and was refused by the Court on the 18th of February, 1879. Under these circumstances the question is whether Dumert and Demaux or Wallani are liable upon the covenants of the lease down to the date when the writ was issued, and to mesne profits down to the time when possession was given up by Wallani.

The argument presented on the part of the plaintiffs was that the lease with all liabilities under it was vested absolutely in the trustees by the Bankruptcy Act, 1869, s. 17, subject to their power to disclaim, and that they had not disclaimed in the manner directed by the statute, and so continued liable. The argument on the part of the defendants was, that upon the true construction of the Bankruptcy Act, 1869, the trustees were not liable unless they had elected to take the lease, that they had not so elected, and that even if they had it was not open to the plaintiffs to say so on the pleadings. The plaintiffs alleged in reply that if an election was necessary the conduct of the trustees amounted to an election to take the lease, and that that point was open to the plaintiffs on the pleadings.

Wallani (who appeared in person at the trial) did not appear when the case came on for further consideration.

I now proceed to consider these arguments.

The first question is whether the Bankruptcy Act of 1869 vests the bankrupt's leasehold properties in the trustee absolutely subject to his right of disclaimer, or whether it is necessary that the trustee should elect to take the lease in order that he may become liable to the burden of the covenants. This question has never,

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I think, been decided, and in order to solve it it is necessary to compare together the provisions of the present and those of the earlier Bankruptcy Acts and to consider the cases decided upon them.

Under the different Acts relating to bankruptcy down to and including 6 Geo. 4, c. 16, the commissioners appointed by the Lord Chancellor were authorized to seize the property of the bankrupt and assign it to assignees for the benefit of the creditors. It was held by a series of authorities, of which *Copeland* v. *Stephens* (1) is perhaps the most distinct and elaborate, that an assignment made in general terms did not vest the bankrupt's leaseholds absolutely in the assignees, but left in them a power to renounce them if it was for the interest of the creditors that they should be renounced. It should be observed, however, that in that case Lord Ellenborough is careful to limit his language to the particular matter before him, which he does in these words: "The judgment of the Court in this case is founded upon its own special and peculiar facts; viz., a general assignment under a commission of bankruptcy, not accompanied or followed by notice of the existence of the term nor by any act of acceptance, entry, or possession." It must also be observed that the judgment proceeds throughout upon an inquiry into the question as to what is required in order to vest a term of years in an assignee of the term. Subsequent legislation has altered the whole scheme of the law of bankruptcy.

By 1 & 2 Will. 4, c. 56, which first established a Court of Bankruptcy, it was enacted (s. 25) that when any person was adjudged a bankrupt "all his personal estate and effects present and future which by the laws now in force may be assigned by commissioners, acting in the execution of a commission, against such bankrupt shall become absolutely vested in and transferred to the assignees or assignee for the time being by virtue of their appointment without any deed of assignment for that purpose, as fully to all intents and purposes as if such estate and effects were assigned by deed to such assignees and the survivor of them."

By the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106, s. 141) this provision was re-enacted in substance, but all reference to

(1) 1 B. & A. 593, 607.

commissions of bankruptcy and to deeds of assignment was omitted. The operative words of the section are, "All his personal estate . . . shall become absolutely vested in the assignees . . . by virtue of their appointment." Upon the earlier Act it might perhaps have been said that the assignees were put in the same position by their appointment as they would have been put in by the execution of the deed of assignment, but not in the position in which they would have been placed by acting under it. The terms of the Act of 1849 do not leave room for this interpretation. The words vest the bankrupt's leaseholds absolutely in the trustees "by virtue of their appointment," though s. 145 of the Act recognizes rather than creates the necessity of an election by the trustees. This view of the matter was taken by Vice-Chancellor Stuart in *Cartwright* v. *Glover* (1), in which it was decided that the assignees of a bankrupt, who allowed the bankrupt to remain in possession of leasehold property and to pay the rent to the lessor, could make a good title to a purchaser although they had done nothing amounting to an election to accept the lease. In his judgment on this case the Vice-Chancellor says, "Nothing can be more clear than that the state of things upon which the whole decision in *Copeland* v. *Stephens* (2) proceeded, viz., that nothing vested until the power was exercised, is no longer applicable to the right of those who claim by assignment under assignees in bankruptcy," and he goes on to treat of the sections which deal with the right of election on the part of the assignees in bankruptcy as a sort of equivalent for the right to refuse burdensome property which they had been held to possess, without any express enactment, under the earlier system. This decision, therefore, seems to be an authority for the proposition that under the Bankruptcy Act of 1849 a bankrupt's leaseholds vested absolutely in his assignee, subject to the provisions of that Act as to the assignee's power of election.

The Act of 1869, 32 & 33 Vict. c. 71, s. 17, contains the following provision: "Upon adjudication the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." So far, therefore, as the vesting of the property in the trustee is concerned,

(1) 2 Giff. 620, 626. (2) 1 B. & A. 593.

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the language of the Act of 1869 is as strong as that of 1849, and is entirely different from that of the Acts consolidated in 1824, upon which *Copeland* v. *Stephens* (1) and other cases were decided. Upon the whole it appears clear that the effect of the provisions contained in the Acts of 1849 and 1869 is to vest the bankrupt's leaseholds in the trustees absolutely, subject to the provisions contained in those Acts as to election and disclaimer.

The second question is whether, taking into account the provisions of s. 23 of the Act of 1869, this vesting makes the trustees personally liable upon the covenants of the lease. In order to answer this question it is necessary to compare the provisions of the Acts of 1849 and 1869, and to consider the cases which have been decided upon the Act of 1869.

First, I will compare the two statutes. Each provides for three possible cases—the case of the assignee or trustee taking the land, the case of his declining to take, and the case of his abstaining from either course. Neither statute states explicitly the full consequences of either of these three courses of action. Each leaves much to be implied. First, as to the Act of 1849. Sect. 145 of that Act provides that if the assignee elects to take the lease the bankrupt is to be free from the burden of the covenants, that if the assignee declines the lease the bankrupt shall be able to free himself from the covenants by delivering up the lease to the lessor within fourteen days after notice that the assignees have declined, and that if the assignee makes no election on being required to do so the lessor shall be at liberty to apply to the Court for an order that he shall elect, whereupon the Court may order the assignee to elect or make such other order as may seem right. The election to take the lease might be made by conduct, and especially by taking possession and doing acts of ownership, and various cases arose as to what amounted to a taking possession or exercising an act of ownership. The effect of all this was that the question whether the bankrupt was or was not to continue liable to the lessor depended on the course taken by the trustees, and that the position of the lessor depended upon the construction to be put upon the conduct of the trustees, a matter which might raise questions of considerable difficulty.

(1) 1 B. & A. 593.

The Act of 1869 contains an entirely different set of provisions, the object of which seems to me to be to give the landlord the means of ascertaining for himself whether the trustees mean to take to the lease or not; and to enable the trustees, on the other hand, to get rid of onerous property, although they may have done acts which would have amounted to an election to take it under the Act of 1849. Sect. 23 effects these objects by providing that the trustee may disclaim by writing under his hand any burdensome property, "notwithstanding he has endeavoured to sell or has taken possession of such property or exercised any act of ownership in relation thereto;" but by s. 24 this right ceases if the trustee declines or neglects to give notice whether he disclaims or not for twenty-eight days after an application in writing to make such a statement has been made to him by some person interested in the property. The Act contains no explicit provision as to the bankrupt being freed from his liability by the trustee's acceptance of his lease, or as to his being able to free himself from it by surrendering his lease. Neither does it contain any explicit provision as to the liability which is imposed upon the trustee either in the case of his disclaiming or in the case of his not disclaiming the lease. It is therefore necessary to consider what consequences follow apart from any such express provision.

This matter has been discussed to some extent in the two cases of *In re Sneezum, Ex parte Davis* (1) and *Ex parte Dressler, In re Solomon* (2), and though neither of these cases is precisely in point, the two together throw much light on the subject. In the case of *In re Sneezum* (1) the bankrupt's trustees had carried on a contract into which the bankrupt had entered. After being called upon to say whether they disclaimed it or not they returned no answer, but continued to carry it on so long as they found it profitable. When they ceased to do so they ceased to perform it, and the Court of Appeal held, confirming the Chief Judge in Bankruptcy and the county court judge, that they were not liable either personally or on behalf of the estate. It will be found on examining the judgments of the Lords Justices that the case decides that s. 23 does not mean that if the trustees fail to disclaim a contract they thereby impliedly adopt the contract, but

(1) 3 Ch. D. 463. (2 9 Ch. D. 252.

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that its effect when taken in connection with other parts of the Act is that if the trustees do disclaim a contract it is to be determined from the date of the adjudication, and that if they do not disclaim they may carry it on as long as they please and discontinue it when they think proper, the other party being at liberty to prove against the estate as for a debt for any loss which he may sustain by their conduct. This decision proceeds upon the principle that the Act of 1869 leaves the earlier law unaltered, except in those cases in which the alteration is made by express words. The earlier law as to a bankrupt's contracts was that the bankrupt continued to be liable upon his contracts notwithstanding his bankruptcy, but his assignees might perform them in his place if they pleased, and as long as they pleased. The express words of s. 31 of the Act of 1869 take away the bankrupt's liability, but the power of the assignees not being taken away by express words, and not being absolutely inconsistent with the provisions as to disclaiming, remains unaltered.

In *Ex parte Dressler* (1) the trustee took possession of a bankrupt's lease, and when called upon to disclaim omitted to do so, and it was held that he became personally liable to pay the rent. The judges who decided the case took the same view as to the effect of the Act of 1869 as was taken in *In re Sneezum*. (2) They thought that the earlier law was unaltered except so far as the express words of the statute altered it. But the earlier law was that a trustee who took possession of the bankrupt's lease became personally liable upon the covenants. He therefore continued to be so.

Each of these cases proceeds on the principle that the scope of s. 23 is not to be extended by implication, and that the trustee is to have the same rights and liabilities as the assignees had before him, unless they are altered by express words.

The question, therefore, in the present case is whether the Act of 1869 contains any express words whereby the necessity for the election of the trustees to take a lease as a condition precedent to their liability on its covenants is taken away. The examination of the history of the law given in the earlier part of this judgment seems to me to supply the answer. I think that under the

(1) 9 Ch. D. 252. (2) 3 Ch. D. 463.

first set of bankruptcy laws—those which were consolidated in 1824—the power of the trustees to renounce onerous leases arose from the absence of any legal enactment vesting such leases in them, and from the insufficiency for that purpose (as explained in *Copeland* v. *Stephens* (1)) of a general assignment. Under the second set of bankruptcy laws, including the Act of 1849, the property was actually vested in them, but a power to elect whether they would take it or not was confirmed by the express words of s. 145 of the Act of 1849. This Act was repealed by 32 & 33 Vict. c. 83. Under the third system established by the Act of 1869, the leases of the bankrupt are vested absolutely in the trustee, subject to his right of disclaimer, but no power of election is given to him or recognized in him. It thus appears to me that the power of election conferred by the Act of 1849 being repealed by express words, and the estate being vested in the trustee by the express words of the Act of 1869, he has no power to get rid of it, except by following the express words of s. 23. I do not think this view is inconsistent with the cases to which I have referred. They shew only that the provisions of the Act of 1869 are not to be extended by implication. I do not intend to do so by this judgment. I think that the position of the trustee has been altered by express words, though not by words which expressly state all the consequences of the alteration. Upon the whole I hold that the lease was vested in the trustees on their appointment, and that they are personally liable upon the covenants, unless they make a valid disclaimer. I think *Ex parte Dressler* (2) is an express authority as to their personal liability, assuming the lease to be vested in them absolutely.

Did they, then, make such a disclaimer as is required by s. 23; that is, did they, or either of them, "by writing under his hand," disclaim such property? It was alleged in argument that the letter of the 24th of December signed by the solicitor to the trustees was such a writing, but I am of opinion that it was not. It is not under the hand of either of the trustees, even if it were absolute in its terms, as to which I think there may be a doubt. Several cases were quoted on the subject, the one most relied upon by the counsel for the defendant being *Reg.* v. *Justices of*

(1) 1 B. & A. 593. (2) 9 Ch. D. 252.

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Kent (1), in which case a notice of appeal required by statute to be "in writing signed by the person giving the same or his attorney," was held to be sufficient when it was signed in the name of the person giving the notice by his attorney's clerk in his presence. In that case, as I understand the report, the attorney's clerk wrote the name of Weld, the appellant, by Weld's authority. In the present case he wrote his own name. I think that to hold this sufficient would be to modify the language of s. 23, by reading for "under his hand," "under his hand or under the hand of his agent."

It was also argued that the letter of the 28th of December, from the plaintiff's solicitor, saying, "I am in receipt of your letter disclaiming lease of No. 32, Alfred Place, on behalf of the trustees of the above-named bankruptcy," was a waiver of the lessor's right to a more formal disclaimer, and *In re Stokoe* (2) was referred to upon this subject. I do not myself think that the letter was more than an acknowledgment of the receipt of the other letter, with a reference to its contents by way of identification. The case of *In re Stokoe* (2) shews only that this was a matter which might be, and which I suppose was, taken into consideration when the question of extending the time for disclaiming was before the Court.

Upon these grounds there will be judgment for the plaintiffs for 85*l.* (45*l.* for rent, and 40*l.* for repairs) and costs. I do not think the plaintiffs are entitled to recover anything for mesne profits, as the trustees were not in possession of the house after the lease was determined by issuing the writ.

The view which I take of the case makes it unnecessary for me to consider the other questions raised.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *C. F. Yorke.*
Solicitor for defendants: *C. A. Swaine.*

(1) Law Rep. 8 Q. B. 305. (2) 2 Ch. D. 802.

[See *Reed* v. *Harvey*, 5 Q. B. D. 185.]

[IN THE COURT OF APPEAL.]

1880
March 19.

LEWIS *v.* LEONARD AND ANOTHER.

Bankruptcy—Bankruptcy Act, 1876, *ss.* 49, 125—*Certificate of Discharge—Proceedings for Liquidation by Arrangement.*

The defendants filed a petition for liquidation by arrangement or composition under the Bankruptcy Act, 1869, and at the first meeting of creditors a resolution was passed that the defendants' discharge might be granted on a certificate of the committee of inspection and trustee to that effect. At a subsequent meeting of creditors, for the purpose of considering a scheme for the settlement of the defendants' affairs, it was resolved that the whole estate should be sold to one of the defendants in consideration of his paying a dividend of 8*s.* in the pound secured by four promissory notes payable at successive dates. The certificate of discharge was granted. The plaintiff was a creditor and proved on the estate to the full amount of his debt. Three of the promissory notes were paid to all the creditors including the plaintiff, but default was made in payment of the fourth:—

Held, first, that the certificate of discharge was by force of the Bankruptcy Act, 1869, ss. 49 and 125, conclusive evidence of the validity of the proceedings under the liquidation, and that the discharge was valid. Secondly, that the plaintiff having received and retained a dividend could not be heard to object to the resolutions.

ACTION by indorsee against acceptors on two bills of exchange, one for 50*l.* at four months' date, and the other for 100*l.* at six months' date.

At the trial before Grove, J., without a jury, at the Spring Assizes for Warwickshire, the following facts were proved. The defendants, who carried on the business of oil and colour merchants and drysalters at Birmingham, on the 29th of November, 1877, filed in the county court of Warwickshire holden at Birmingham, a petition for liquidation of their affairs by arrangement or composition under the Bankruptcy Act, 1869. At the first general meeting of creditors, held on the 28th of December, 1877, resolutions were duly passed "that the affairs of the defendants should be liquidated by arrangement and not in bankruptcy: that C. T. Starkey be appointed trustee with a committee of inspection: and that the debtors' discharge might be granted on a certificate of the committee of inspection and trustee to that effect." The plaintiff was present at this meeting and proved on the estate of

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the defendants for the full amount of his debt, 150*l.* These resolutions were duly registered.

On the 18th of January, 1878, a general meeting of the creditors of the defendants was duly convened and held for the purpose of considering a scheme for the settlement of the affairs of the defendants, and at such meeting the following resolutions were duly passed: "That the trustee with the approval of the committee of inspection (which has already been given) do sell the whole of the interest of the creditors and trustee in the joint estate of the debtors and in the separate estate of J. H. Leonard to S. Leonard alone, in consideration of his paying the whole of the legal charges of the petition, and also a sum sufficient to produce a dividend of 8*s.* in the pound on the debts due to the creditors. Such purchase-money to be payable by the separate promissory notes of S. Leonard in favour of the creditors by four equal instalments at two, four, six, and eight calendar months from the approval by the Court of the terms of that scheme; the payment of the promissory notes to be secured by the bond of the trustee of S. Leonard and of eight sureties." "The trustee to retain possession of the estate until the terms are carried out, and the Court to approve of the terms of the scheme, and then to give the debtors their discharge."

All the terms of the scheme were duly carried out, and on the 12th of February, 1878, the scheme was duly approved by the Court. The trustee under the liquidation having certified and reported to the registrar of the court that the defendants were entitled to receive their discharge, he, on the 1st of March, 1878, granted the defendants their discharge pursuant to the statute. Four promissory notes for 15*l.* each at two, four, six, and eight months' date were sent to the plaintiff and retained by him, the first three of which were duly paid, but default was made in the payment of the last.

On these facts the learned judge decided that the certificate of discharge was a good answer to the action, and directed judgment to be entered for the defendants.

The plaintiff appealed.

Nov. 15, 1879. *De Gex, Q.C.*, and *Dugdale*, for the plaintiff.

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The discharge given to the defendants is not a valid discharge. It must be borne in mind that the proceedings are for a liquidation by arrangement of the bankrupt's affairs, and not for an adjudication in bankruptcy. Therefore by s. 125, sub-s. 9, the provisions of the Bankruptcy Act, 1869, as to the close of the bankruptcy (s. 47) and the discharge of the bankrupt and the trustee (s. 48) do not apply; but the discharge of the debtor and the trustee must be granted by a special resolution of the creditors passed at a general meeting. Here it would appear that under s. 28 a meeting was called to consider a general scheme of arrangement of the affairs of the bankrupt, and at that meeting the trustee was empowered to grant the bankrupt a discharge; this section applies only to cases in bankruptcy: there was no special meeting called for this purpose under s. 125, sub-s. 9. The creditors are not authorized to delegate the power of granting a certificate of discharge to the trustee: *Ex parte Hope.* (1) No doubt under rule 302, where liquidation by arrangement and not in bankruptcy has been resolved on, the creditors may, at the same meeting at which such resolution is passed, resolve whether the debtor's discharge shall be granted either forthwith or at a date to be specified in the resolutions or subject to any and what conditions. The meaning of the rule is that it may be done at a general meeting by a special resolution, but the second meeting here was not a meeting under rule 302 for it had none of the safeguards provided for by s. 125.

Nov. 17. *Mellor, Q.C.*, and *W. Graham*, for the defendants. The certificate of discharge by force of rule 302 combined with s. 125, sub-ss. 9, 10, is valid. By that rule the discharge may be granted subject to any condition. The plaintiff has accepted the dividend to be paid under the resolutions, and he is now precluded from taking exception to them. If the resolutions were invalid, he ought to have opposed the registration of them. In *Ex parte Hope* (1) the creditors had not only delegated their authority to the trustee, but they had also invested him with a discretion to determine whether the discharge should be granted.

Dugdale, in reply.

Cur. adv. vult.

(1) 9 Ch. D. 398.

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March 19, 1880. The judgment of the Court (Lord Coleridge, C.J., Bramwell and Brett, L.JJ.) was delivered by

BRAMWELL, L.J. I am of opinion that the defendants are entitled to judgment. They have obtained a certificate of discharge. By s. 125, sub-s. 10, that certificate "shall have the same effect as an order of discharge given to a bankrupt." By s. 49 "an order of discharge shall be sufficient evidence of the bankruptcy and of the validity of the proceedings thereon." The words are "sufficient evidence," but there is no doubt that this means "conclusive." The course of any one complaining of such order, or intended order, or the report of the trustee or certificate under s. 125, sub-s. 10, is to apply to be heard against the making of it; or if made, to get it set aside. It cannot remain in existence and be contested, as proposed in this case. But there is another ground on which the defendants are entitled to judgment. The plaintiff indeed opposed the resolution, but has received and retained a dividend. While he retains the benefit the resolutions give him, and which he has accepted, he cannot be heard to deny the validity of those resolutions. The object of ss. 125 and 126 is to bind a dissentient minority by the votes of a specified majority. The legislation is quoad the majority needless. Before this Act, and others similar to it, creditors assenting to an arrangement or composition with a debtor were bound: see *Good* v. *Cheeseman* (1), and especially *Boyd* v. *Hind*, per Williams, J. (2) It was upon this ground I thought the judgment in *Campbell* v. *Im Thurn* (3) proceeded. Lord Blackburn, however, in *Breslauer* v. *Brown* (4) says "such a supposition is absolutely contrary to the fact," viz., that the creditors agree to a composition among themselves. He does not think that a creditor who comes in and votes for such a composition dreams that he is entering into a bargain, and adds what is certainly true, that if he votes against it, he makes no bargain. Such expressions do not alter my view of the grounds on which *Campbell* v. *Im Thurn* (3) was in my opinion decided, and rightly decided. But it is not necessary to determine this difference of opinion, for Lord Blackburn proceeds

(1) 2 B. & Ad. 328.
(2) 1 H. & N. 938, at p. 947.
(3) 1 C. P. D. 267.
(4) 3 App. Cas. 672, at p. 705.

to say: "In either case, i.e., whether he has voted for or against the resolutions," he has waived the conditions, and submitted to the Court of Bankruptcy. I do not understand this. If it means he submitted by compulsion, it is incorrect; if it means he submitted by agreement, it looks like a bargain. However, this also is immaterial. They got right somehow it seems in *Campbell* v. *Im Thurn.* (1) And according to this opinion of Lord Blackburn, or according to the one which I thought decided *Campbell* v. *Im Thurn* (1), the creditor is bound if he votes on or assents to the proceedings; à fortiori must he be if he takes a benefit under them as here. It is said he could not help himself. That is not so. He could. He might have refused the dividend, and taken the proceedings he is now taking. I repeat it is impossible he can retain the money he has received, and yet deny the validity of the proceedings under which he has received it. To do so would be contrary to all analogy and to principle. It is unnecessary to discuss the other matters controverted before us.

Judgment affirmed.

Solicitors for plaintiff: *Robinson, Preston, & Stow, for Rowlands, Bagnall, & Co., Birmingham.*

Solicitors for defendants: *Byrne & Lucas.*

(1) 1 C. P. D. 267.

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[IN THE COURT OF APPEAL.]

LOWREY *v.* BARKER & SONS.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 24—*Lease—Disclaimer—Liability of Trustee—Implied Contract of Tenancy by Use and Occupation —Trespass.*

A trustee in bankruptcy upon disclaimer of a lease granted to the bankrupt does not become personally liable to the lessor, either upon an implied contract of tenancy, or as a trespasser, in respect of the period between the time when his actual occupation ceases, and the date when the disclaimer is executed.

Quære (per Cockburn, C.J., and Thesiger, L.J.) whether upon the execution of the disclaimer all personal liability of the trustee ceases in respect of the period during which he has had an actual occupation of the demised hereditaments.

APPEAL of the defendants from the judgment of Brett, L.J., at the trial.

The facts of the case are sufficiently stated in the judgment of Cotton, L.J.

Dec. 8, 1879. *C. Russell, Q.C.*, and *H. Shield*, for the defendants. At the trial the Lord Justice gave judgment for the plaintiff upon the counter-claim, on the ground that by the disclaimer of the lease the term originally granted to the bankrupts must be deemed to have come to an end at the date of adjudication; it may be admitted that the remedy on the covenants of the lease is gone; but it is contended that the plaintiff, as trustee of the estate, is liable upon an implied contract for use and occupation of the manufacturing premises, for he had the enjoyment of them up to the 20th of May, about which day he disclaimed, and the intervening rights were not annihilated. The authorities are not inconsistent with the argument for the defendants. *In re Sneezum, Ex parte Davis* (1), was a case of a contract, and the liabilities depending upon a contract may be governed by different principles from those regulating the rights of the parties to a lease. *Ex parte Llynvi Coal and Iron Co., In re Hide* (2), merely shews that upon the disclaimer the defendants might have had

(1) 3 Ch. D. 463. (2) Law Rep. 7 Ch. 28.

some claim against the bankrupts' estate. *Ex parte Dressler, In re Solomon* (1), establishes that if a trustee remains in possession of premises after he has been called upon to disclaim, he may become personally liable for the rent, and *Ex parte Brook, In re Roberts* (2), is an authority for the proposition that upon a disclaimer the trustee occupies the same position as if he had never had any estate in the demised property. As the plaintiff has had the beneficial occupation, it is for him to shew that he is not liable to pay the rent: *Ward* v. *Mason* (3), *Harland* v. *Bromley*. (4) By the disclaimer the term does not come to an end for all purposes: *Smyth* v. *North*. (5) Even if the term ended for all purposes by force of the disclaimer, and if no contract can be implied, then the trustee became a trespasser, and he is liable to pay damages to the defendants on account of his wrongful occupation.

A. Wills, Q.C., for the plaintiff. The intention of the legislature was that every facility should be afforded to the trustee, in order to wind up the estate for the benefit of the creditors, and it would be unreasonable to hold that if he occupies any premises leased to the bankrupt, in order to dispose of the property devolving upon him to the best advantage, he thereby incurs a personal liability. Time ought to be allowed to him that he may have a fair opportunity of determining what course he ought to adopt.

H. Shield replied.

Cur. adv. vult.

March 19, 1880. The following judgments were delivered:

COTTON, L.J. (6) The question in this appeal arises on a counter-claim put in by the defendants. The plaintiff is trustee in bankruptcy of the estate of Messrs. Dixon, who became bankrupt on the 8th of October, 1877. At the time of the bankruptcy Messrs. Dixon held certain manufacturing premises as tenants of the defendants under a lease made in March, 1874. The plaintiff, after the bankruptcy, for a time continued to occupy these

(1) 9 Ch. D. 252.
(2) 10 Ch. D. 100.
(3) 9 Price, 291.
(4) 1 Stark. 455.
(5) Law Rep. 7 Ex. 242.
(6) This judgment was read by Thesiger, L.J.

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premises, for the purpose of completing certain work in hand, and while so in occupation did work for the defendants. The plaintiff paid the rent due on the 1st of January, 1878, and after that time he in no way used the demised premises, except that till sometime in January, 1878, he kept there, and in that month sold, certain chattels belonging to the bankrupt's estate. The quarter's rent due on the 1st of April, 1878, was paid, not by the plaintiff but by Messrs. Wilkinson & Kendell, who were creditors of the bankrupts, and entitled by assignment to such interest as the bankrupts had in certain machinery on the premises, which under a covenant in the lease were at the expiration thereof to be paid for by the landlord. Apparently some negotiation was going on between the defendants and Wilkinson & Kendell, with reference either to this machinery or to the lease of the premises, and in the meantime the plaintiff retained the key; but on the 20th of May the negotiations between the defendants and Wilkinson & Kendell having come to an end, the plaintiff, under the provisions of sect. 23 of the Bankruptcy Act, 1869, disclaimed the lease of the premises and gave up the key to the defendants. The plaintiff brought his action for the price of the work done for the defendants, and they by counter-claim sought to recover rent from the 1st of April down to the time that the key was given up by the plaintiff to them. Under sect. 23 of the Bankruptcy Act, 1869, when a disclaimer is given the lease is to be deemed to have been surrendered as on the date of the adjudication, in this case on the 8th of October, 1877; and having regard to the operation of the statute the trustee must be considered as never having had any interest in the lease, and the question is whether or no, notwithstanding that in fact the lease existed down to the 20th of May, and such possession as he had previously to that day was under the lease, he is to be held liable either under an implied contract for use and occupation or as a trespasser? Brett, L.J., before whom the case was heard, decided in favour of the plaintiff against the counter-claim; hence the appeal to us.

I will first deal with the question whether the counter-claim can be sustained under an implied contract by the trustee in bankruptcy to pay for use and occupation of the premises. Such use

and occupation as existed was with reference to, and under, the lease, and though the subsequent disclaimer of the trustee under the statute requires us to treat the lease as if it never existed subsequently to the bankruptcy, yet when in fact the occupation has been with reference to an express existing contract, it is not, in my opinion, right to imply a contract with reference to the occupation which the parties never could have contemplated.

It is a very different question whether the trustee can be treated as a trespasser. In dealing with this part of the case I think we must consider the intention of the enactment which we are considering. Independently of its operation a trustee in bankruptcy, who for the benefit of the estate had for a time occupied premises held on lease by the bankrupt, would be personally liable as tenant, with a right of indemnity against the estate if sufficient for the purpose, and the object of the statute was to relieve the trustee from this personal liability, and the creditors from the loss resulting from his claim for indemnity. Moreover, it does so by treating the lease as surrendered not as from the date of the disclaimer but as from the date of the order of adjudication, which points to an intention entirely to relieve both the trustee and the estate from all liability. The case of *Ex parte Brook* (1) is an authority that certain acts of the trustee between the adjudication and the disclaimer are to be treated as wrongful acts. But in that case the acts of the trustee were the severance of fixtures belonging to the landlord, unless removed during the existence of the lease. Here the act relied upon by the defendants was the formal continuance of possession by retaining the key without any actual use of the premises or dealing with any thing thereon. In my opinion it would not be right, in consequence of the trustee subsequently exercising the power of disclaimer which he had under the Act, even although he has taken possession, to treat these acts as wrongful and tortious, and sufficient to subject the trustee to a claim for damages as a trespasser. The landlord might have protected himself, if he had thought fit, by exercising the power given to him by s. 24 of calling on the trustee to elect whether he would disclaim or not, and if the landlord is in fact

(1) 10 Ch. D. 100.

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injured by what is done, he has, under the latter part of s. 23, a right of proof against the estate of the bankrupt.

BRAMWELL, L.J. I am also of opinion that the judgment should be affirmed. The question is not whether the plaintiff could disclaim when he did. The question is, whether he is liable on a contract to pay for use and occupation. It is an action of contract. There is no express contract, and the question therefore must be whether there is one implied. The only ground for implying such a contract is that otherwise the plaintiff is a trespasser by virtue of the retrospective operation of s. 23. I think that a trespass cannot be turned into a contract in this way. But that is immaterial, because if the plaintiff was a trespasser I think there ought to be an amendment to enable the question in controversy between the parties to be tried. That question is, whether, the lease being to be deemed to be surrendered on the day of the adjudication, the defendants are entitled to a compensation for the plaintiff's occupation of the premises after that period. Is the plaintiff a trespasser, then, by reason of such occupation? I am of opinion he is not. It seems to me impossible to hold that a power of disclaimer given for the benefit of the estate can only be exercised on the terms of its trustee becoming a wrong-doer and trespasser, nor can it be possible to imply a contract to pay for the occupation on a quantum meruit in respect of an occupation which, had there been no disclaimer, would have been as assignee of the lease. As to *Ex parte Brook* (1) it was not necessary there for the trustee to do what he did in order to enable him to decide whether he would take to the lease; the act was not of the character of those so necessary. But more or less of an occupation is necessary for such a purpose, and is contemplated by the statute. If the occupation here was too much, the defendants should have treated the disclaimer as a nullity, and sued the plaintiff as assignee of the lease. It is said to be hard on the lessor. So it is, but it is the hardship of all who deal with those who become bankrupt.

THESIGER, L.J. I agree with Cotton, L.J., in the conclusion

(1) 10 Ch. D. 100.

that the judgment appealed from should be affirmed, and if the reasoning by which that conclusion is arrived at be limited to the circumstances of this particular case I assent to it, for I am of opinion that here there was neither contract by the plaintiff to pay for use and occupation, nor liability on his part as for a trespass in respect to the period to which the counter-claim relates. The actual occupation by the plaintiff, which ceased before the 1st of January, 1878, was treated as an occupation under the lease, and for it as such, payment was made and accepted; and there was no subsequent occupation by him, which could be held to constitute a trespass or to raise the implication of a contract. But I desire to guard myself against being supposed to lay down as a general principle that a trustee in bankruptcy who, after having had actual use and occupation of the bankrupt's leasehold premises, without payment, disclaims the property, is under no personal liability. (1) It seems manifestly unjust that the landlord should be remitted to proof in the bankruptcy, and should thus be a sufferer over and above the other creditors of the bankrupt in respect of damage to him, which even under the powers given to him by s. 24 of the Bankruptcy Act he could not wholly prevent; and which is incurred after the bankruptcy and for the benefit of the general body of creditors. On the other hand, there is no reason, as a matter of justice, why the bankrupt's estate should not indemnify the trustee for what he is called upon to pay in respect of an occupation which he need not and would not have enjoyed except for the purpose of increasing that estate. I see no legal difficulty in the way of implying a contract to pay in a case where the trustee alleges that, notwithstanding the effect of the disclaimer, he is not a wrong-doer and the landlord by not calling upon him to disclaim has in a manner assented to his occupation; while, if such a contract is not to be implied, I do not see why upon the lines of the decision in *Ex parte Brook* (2), and as a further solution of the problem how to adjust rights and liabilties where something is to be deemed to have been done which has not in fact or in law been done, the trustee should not be deemed a trespasser. He has by his own act divested himself of any protection under the lease, he has ex hypothesi no other contractual

(1) See *Wilson* v. *Wallani*, ante, p. 155. (2) 10 Ch. D. 100.

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protection, and the section of the Act of Parliament (s. 23) under which he disclaims, while expressly providing that his disclaimer shall not be invalidated by his having taken possession of the property disclaimed or exercised any act of ownership in relation thereto, which would have been the case under the prior bankruptcy law, contains no provision that the liability of the trustee, which by the general law as well as the prior bankruptcy law such possession or acts of ownership would have entailed, is in every shape and form to cease. The provision at the end of the section, that "any person injured by the operation of the section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy," may perhaps be intended to include the injury caused to a landlord by the occupation of the premises by the trustee for the period between the date of the adjudication in bankruptcy and that of the disclaimer, and thus inferentially to exclude the liability of the trustee for such occupation; but it is by no means clear to me that it was so intended or ought to be so construed; and I prefer to keep my mind open upon this important question for some occasion when it becomes necessary to decide it.

I have the authority of Cockburn, C.J., to say that he concurs in the judgment which I have just delivered.

Judgment affirmed.

Solicitors for plaintiff: *Hamlin & Grammer.*
Solicitors for defendants: *Nelson, Barr, & Nelson.*

[IN THE COURT OF APPEAL.]

1880
Feb. 26.

HINCHCLIFFE *v.* BARWICK.

Sale of Goods—Sale of specific Chattel—Conditions of Sale—Warranty.

The plaintiff bought a horse by public auction at a repository warranted to be a good worker, subject to the condition that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty must be returned before five o'clock of the day after the sale; shall then be tried by a person to be appointed by the auctioneer, and the decision of such person shall be final." The horse was not returned within the stipulated time:—

Held, on demurrer, in an action on the warranty, that the plaintiff's only remedy was under the condition, and that he could not maintain the action.

CLAIM stated that the defendant sold to the plaintiff a certain roan gelding called Dragon at the price of 53*l.* 10*s.*, warranting that the gelding was a good worker, and the plaintiff bought the same from the defendant on the faith of the warranty; that the gelding was not at the time of the sale and is not a good worker.

Defence: That the horse was sold by the defendant to the plaintiff, as being the highest bidder for it at a public auction held at the Royal City Repository, situate at Barbican, in the city of London, subject to certain printed conditions of sale, and amongst them the following condition: "Horses warranted quiet in harness, or quiet to ride, or good workers, or in any other respect (whether sold by private treaty or public auction), not answering such warranty must be returned before five o'clock the day after the sale, shall then be tried by a competent person to be appointed by the proprietors of this establishment, and the decision of such person shall be final; the expenses of trial, viz., 10*s.*, shall be paid by the party in error. Horses returned not answering the warranty will be charged for at the rate of 5 per cent. upon the sum realised at sale." That even if the horse was warranted at the sale to be a good worker, which the defendant denies, the plaintiff did not return the horse before five o'clock the day after the sale in compliance with the conditions.

Demurrer, on the ground that the condition only relates to the return of the horse, and does not debar the purchaser from claiming damages for any breach of warranty.

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On argument of the demurrer the Exchequer Division decided that the statement of defence was an answer to the plaintiff's claim, and overruled the demurrer.

The plaintiff appealed.

D. Seymour, Q.C., and *Bray*, for the plaintiff, in support of the demurrer. The judgment of the Court below is erroneous. The remedy given to the purchaser under the conditions of sale is not a substitutional but an additional remedy. The condition is inserted for the protection of the auctioneer, the defendant; its object is to enable him safely to pay the purchase-money over to the seller; and to secure this protection to the auctioneer, the condition provides for two things, that the horse shall be returned in a certain time; that he shall be examined by a person to be named by him, whose decision shall be final. If the plaintiff does not within the stipulated time return the horse, he is remitted to his original right, and can maintain an action for breach of the warranty. If the action were brought for money had and received the horse must have been returned: *Towers* v. *Barrett* (1); but an action on the warranty may be brought without either the horse being returned or notice given of the unsoundness: *Fielder* v. *Starkin*. (2) There are no words limiting the duration of the warranty, as in *Chapman* v. *Gwyther* (3); *Bywater* v. *Richardson* (4); *Smart* v. *Hyde*. (5)

[They also cited *Head* v. *Tattersall* (6) and *Adam* v. *Richards*. (7)]

Charles, Q.C., and *C. Hall*, for the defendant, contrà, were not heard.

BRAMWELL, L.J. I am of opinion that the judgment of the Exchequer Division is right. The condition set out in the statement of defence is informal. The words are "must be returned," but the condition does not state what are the consequences of not returning the horse. The plaintiff, however, contends that although the horse is not returned he still retains his remedy for a breach of warranty. If a man buy a horse or any other thing

(1) 1 T. R. 133.
(2) 1 H. Bl. 17.
(3) Law Rep. 1 Q. B. 463.
(4) 1 A. & E. 508.
(5) 8 M. & W. 723.
(6) Law Rep. 7 Ex. 7.
(7) 2 H. Bl. 573.

with a warranty, and the warranty is broken, his only remedy is by bringing an action on the warranty. But here, by the condition, the remedy of the purchaser is to return the horse, and have the matter adjudicated and determined in the manner pointed out; and I can well understand that the provision is a useful one. If there has been any fraud the case is taken out of the contract, and then the purchaser does not rely on the warranty. He can bring his action on the fraudulent representation. The parties, as it were, say let us have no difficulty hereafter with regard to the sale of this horse. I say he is sound, but on this condition, if it should turn out he is not sound he must be returned before five o'clock the next day, and the question must be dealt with according to the printed condition. I think that is a reasonable bargain. The demurrer must be allowed.

BAGGALLAY, L.J. The horse was sold by public auction at a repository; and the condition under which he was sold is an entire condition. If a horse is sold warranted sound or a good worker, and after the sale it appears that he is not sound or is not a good worker, he must be returned within a certain time, tried by a person to be appointed by the auctioneer, and the decision of the person is to be final. It appears to me, therefore, that the object of the condition was to provide a ready mode of ascertaining and deciding between the parties whether there was any breach of the warranty, and that such decision was to be final. I think the judgment of the Exchequer Division right.

THESIGER, L.J. I agree that the judgment of the Exchequer Division is right, and that the demurrer ought to be allowed. It is well established at law that, where a warranty has been given, the only remedy, if the horse proves unsound, is an action for breach of the warranty. A buyer cannot return the horse unless there is some special bargain between the parties. But at public sales by auction at a repository, sales are made between parties unknown to one another, and it is an object at such sales that the dealings should be carried out in such a way as to ensure as little litigation as possible. The mode in which this object is carried out at all horse repositories is that where a warranty is given, which is not

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complied with, the horse is to be returned within a certain time, he is examined by a competent person, who gives a final decision, and if the horse is found to be unsound the auctioneer takes him back, and the purchaser's money is returned to him. The consequence of this mode of dealing is that few disputes occur. Bearing in mind this practical view of the matter, what have these parties agreed to? The condition is one framed by the auctioneer as the condition on which one man buys and another sells—the buyer and seller stand on equal terms within it. The words are not clear, but they are sufficiently intelligible. They do not say that the horse *may*, but that he *must* be returned within a certain time; he *shall* be tried by a person to be appointed by the auctioneer, whose decision *shall* be final. I think these words mean that the purchaser agrees that the return of the horse in the manner provided for is to be his only remedy. The construction is reasonable, and accords with the practical view of the question.

Judgment affirmed.

Solicitors for plaintiff: *Torr, Janeways, Torr, & Gribble.*
Solicitors for defendant: *Keene & Marsland.*

Feb. 18.

[IN THE COURT OF APPEAL.]

MYERS *v.* DEFRIES AND OTHERS (No. 2).

Practice—Costs—"Event"—Several Causes of Action—Rules of Hilary Term, 1853, No. 62—Rules of the Supreme Court, 1875, Order LV., rule 1.

When in the same action the jury find for the plaintiff with damages as to one cause of action and for the defendant as to other and distinct causes of action, the word "event" in the proviso to Rules of the Supreme Court, 1875, Order LV., rule 1, must be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or by the Court.

Judgment of the Exchequer Division (ante, p. 15) affirmed.

APPEAL by the plaintiff from an order of Pollock and Huddleston, B.B., dismissing an application to review the taxation of the defendants' costs.

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The facts of the case are stated in the judgment of the Exchequer Division. (1) It will be sufficient here to mention that the plaintiff sued the defendants for malicious proceedings in bankruptcy; for libel and slander; for trespass, and conspiracy. At the second trial, which took place before a jury, the finding was entered for the plaintiff with one farthing damages as to the claim for libel, and for the defendants as to all the other issues. The Exchequer Division held that the defendants were entitled to the costs of the issues found for them. (1) It had been previously ordered by the Exchequer Division and by the Court of Appeal that the plaintiff should have no costs of the action. (2)

Feb. 17, 18. *Murphy, Q.C.*, and *W. H. Clay*, for the plaintiff. First, the "event" of the second trial is in favour of the plaintiff according to Order LV. He has obtained a finding of the jury for some amount of damages, and judgment has been entered for him; whereas the defendants, from the very nature of the case, have recovered nothing. That party wins the event to whom some amount is awarded: *Chatfield* v. *Sedgwick*. (3)

Secondly, if the "event" of the trial is not in favour of the plaintiff, nevertheless it is not wholly in favour of the defendants; for they have failed as to one of the causes of action alleged against them; and it is contended for the plaintiff that in the proviso of Order LV. the word "event" means the whole event, and that in order to entitle a party to the costs he must succeed as to each of the causes of action. The "event" is the result of all the proceedings incidental to the litigation: *Field* v. *Great Northern Ry. Co.* (4) Upon taxation the master followed the practice existing before the Judicature Acts, 1873, 1875. This practice was regulated by the Common Law Procedure Act, 1852, s. 81, and by the Rules of Hilary Term, 1853, No. 62, and pursuant to it the costs of an issue followed the finding thereon. But all provisions as to costs contained in former statutes are now abolished: *Garnett* v. *Bradley* (5); and the rules which governed the apportionment of costs are now no longer in force: *Ex parte*

(1) Ante, p. 15.
(2) 4 Ex. D. 176.
(3) 4 C. P. D. 459.
(4) 3 Ex. D. 261.
(5) 3 App. Cas. 944.

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Mercers' Co. (1) The Court below were of opinion that the old statutes and practice as to costs had been swept away, but they held that the word "event" must be read distributively. This construction is erroneous; the word must be taken to mean "the result of the action," an interpretation supported by the construction which has been put upon the language of orders of reference: for instance, where the costs of the award and of the reference are to abide the event of an award, if the award be partly in favour of one party and partly in favour of the other, though there be a substantial balance in favour of one, each party must bear his own costs: *Gribble* v. *Buchanan.* (2) A similar principle has been followed where the costs of the action and of a reference and award were to abide the event of the award: *Boodle* v. *Davies* (3); and where the costs of an action and of a suit in equity were to abide the award: *Reeves* v. *M'Gregor.* (4) No hardship is inflicted upon the defendants by the construction contended for by the plaintiff; the proper course was to apply to the judge at the trial for their costs, and if they had done so the plaintiff might have shewn good cause why they should not have them. No doubt "issues" are mentioned in Order XXVI. and Order XXXVI., rules 26, 27, and 29; but the issues there mentioned are those which a judge has power to direct, and they are not such "issues" of law or fact as formerly existed. "Issues" in the old sense of the word have ceased to exist, leaving costs to be dealt with at the discretion of the Court or judge. No fair reason can be assigned why the word "event" should be read distributively, and the decision in the Exchequer Division was evidently based upon the supposed hardship of the construction contended for by the plaintiff.

Thirdly, the defendants have estopped themselves from applying for the costs of the issues found in their favour; they have already obtained an order depriving the plaintiff of costs (5); the question of costs was then disposed of. The point in dispute is res judicata, and the plaintiff ought not to be liable to any costs.

Gates, Q.C., and *Edward Pollock*, for the defendants.

(1) 10 Ch. D. 481.
(2) 18 C. B. 691; 26 L. J. (C.P.) 24.
(3) 3 A. & E. 200.
(4) 9 A. & E. 576.
(5) 4 Ex. D. 176.

[BRAMWELL, L.J. We do not require any argument as to the plaintiff's third contention: it is clearly unsustainable.]

It was intended by the legislature to preserve the practice and principles formerly existing as to the taxation of costs: Rules of the Supreme Court (Costs), No. 28, Special Allowances and General Provisions. The issues must be dealt with distributively. *Blake* v. *Appleyard* (1) relates to a counter-claim; it is nevertheless a strong authority for the defendants. They do not claim the costs of the action, but only the costs of the issues found in their favour; and to these they are without doubt entitled: *Halliman* v. *Price*. (2) Under the former practice of the Court of Chancery, when a bill was partly dismissed but the plaintiff succeeded as to part of his claim, the costs might be apportioned: *Attorney-General* v. *Lord Carington*. (3) It is incorrect to argue that issues are abolished; they still remain. It has been contended for the plaintiff that in the proviso of Order LV. "event" means the whole event; but the judgment in an action in which a claim and a counter-claim are pleaded is but one event, and yet the defendant, if he succeeds as to the counter-claim, is entitled to his costs. In *Saner* v. *Bilton* (4) the plaintiff's claim and the defendant's counter-claim were both dismissed with costs, and it was held that the plaintiff must pay to the defendant the general costs of the action, and that the defendant must pay to the plaintiff only the amount by which the costs had been increased by reason of the counter-claim. It is the defendants who have substantially succeeded at the trial: *Kelcey* v. *Stupples*. (5) No case precisely in point is to be found; but the principle contended for by the defendants is supported by the judgment of this Court in *Berdan* v. *Greenwood*. (6) It appears to be there assumed that issues may be found for each party, and the costs taxed accordingly. *Cole, Marchant, & Co.* v. *Firth and Another* (7) is an authority for the defendants. *Davidson* v. *Gray, Barrow, & Co.* (8) is only to be explained upon the ground that the general finding was erroneous, and that the finding ought to have been entered

(1) 3 Ex. D. 195.
(2) 41 L. T. (N.S.) 627.
(3) 6 Beav. 454, at p. 458.
(4) 11 Ch. D. 416.
(5) 1 H. & C. 576, per Pollock, C.B.
(6) 3 Ex. D. 251, at p. 257.
(7) 40 L. T. (N.S.) 851, at p. 857, per Kelly, C.B.
(8) See note at end of case.

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distributively. The word "event" in the proviso means the result of each separate cause of action.

Murphy, Q.C., in reply. *Saner* v. *Bilton* (1) is not in point, for the proviso in Order LV. relates to trials before a jury; moreover the plaintiff had totally failed to prove his case. It is to be recollected that the judgment in the action, when drawn up, is single, at least in point of form; and upon the judgment the plaintiff appears as the successful party. The costs of issues are created by statute; all statutes as to costs are abolished by the Judicature Acts, 1873, 1875, and the costs of issues are not re-introduced by the proviso in Order LV.

BRAMWELL, L.J. I think that the judgment of the Exchequer Division must be affirmed. Order LV. is unfortunate in its language, and it may be expedient to annul it and to substitute in its place provisions expressed in clearer terms. The difficulty of construing the order is increased by the circumstance, that most probably a case like the present was not contemplated by those who framed it. Independently of the decision of the House of Lords in *Garnett* v. *Bradley* (2), I quite agree that the old law as to costs is gone; but we may look upon it as a guide, for the former rules as to apportioning the liability for costs were in themselves reasonable and ought to be followed wherever it is practicable. It has been contended by the counsel for the plaintiff that the proviso in Order LV. applies only where the result of the trial is wholly in favour of one of the parties; and further it has been argued that the result is in the plaintiff's favour, because he has obtained by way of damages one farthing, which he is entitled to receive from the defendants, whereas the latter have recovered nothing. In this view the proviso would have an unreasonable operation. A plaintiff may rely upon two causes of action; he may fail in one, and succeed in the other: is it just that the defendant should be obliged to bear the expense of resisting an unrighteous claim, because the plaintiff may be able to prove that he has a valid claim for a trumpery amount? The objection to this unreasonable construction of the rule is not taken away by the circumstance, that upon good cause being

(1) 11 Ch. D. 416. (2) 3 App. Cas. 944.

shewn the judge may, in his discretion, direct that the costs shall be borne by the party who has caused the unnecessary and perhaps vexatious litigation; it is bad legislation to lay down an unreasonable rule, and then to give power to amend it. I think that the construction suggested on behalf of the defendants is fair and ought to be adopted. "Event" means not merely the finding of the jury, but the event of the cause. If the plaintiff relies upon several grounds of suit, there may be several "events," and in my opinion "event" may be read as a nomen collectivum. Suppose that the word "result" had been used: could it be successfully contended that a defendant is entitled to no costs upon the causes of action as to which he has succeeded, because he has failed as to others? Must there have been a wholly one-sided "result" in his favour in order to entitle him to any costs? I certainly think not. The meaning to be ascribed to the proviso of Order LV., as it stands, is that where there are several events, costs shall follow the events respectively. The question remains, who shall recover the general costs of the cause? The plaintiff will be entitled to recover all those costs which have been incurred in producing the result in his favour; the defendants will get all costs of resisting those parts of the plaintiff's claim which have been defeated. Upon this view the plaintiff, if he is not deprived of his costs either by order of the judge or under the County Courts Act, will still be entitled to the general costs of the cause, from which must be deducted the costs of the portions of his claim, as to which the defendants have succeeded. The items to be allowed to each party can be ascertained without much difficulty by the master upon taxation. The principle which I have endeavoured to lay down is much more reasonable than that contended for by the counsel for the plaintiff.

BAGGALLAY, L.J. I am of the same opinion. I feel no doubt as to the true construction of the orders and rules which have been cited before us. It has been argued that the event of the trial is in favour of the plaintiff. I cannot assent to that, even although only one judgment might have been entered. The plaintiff relied upon three causes of action: he succeeded as to one, but failed as to the other two; if the "event" means the result of the trial, that result is not favourable to either party. It has been also

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contended the word "event" means the whole result, and that a defendant can be entitled to costs only when he has succeeded as to every cause of action relied on by the plaintiff. I cannot agree to this: when a statement of claim sets forth several causes of action, they may be dealt with separately as regards the question of costs. The present practice as to joining several causes of action is regulated by Rules of the Supreme Court, Order XVII., and by the first rule of that order where a plaintiff has joined several causes of action which cannot be conveniently disposed of together, a judge may order them to be tried separately. It is a mere matter of convenience whether distinct causes of action shall be tried together, and if separate trials had been directed of the grievances alleged by the plaintiff, the defendants would have had the costs of those issues upon which they succeeded. And if the plaintiff had brought separate actions for malicious proceedings in bankruptcy and for trespass, the defendants would have been entitled to the costs. It seems to me, therefore, that the costs must be taxed according to the former practice of the Courts of Common Law, and that they must be distributed according to the "event" of the respective issues. If a mistake be made by the master as to a matter of principle, his taxation may be reviewed; but now we have only to lay down a rule to be followed, where each party has succeeded upon one or more of the issues. I quite agree that No. 62 of the Rules of Hilary Term, 1853, has been abolished; we may, however, look upon it as a guide in determining the question before us.

THESIGER, L.J. In this case the plaintiff claimed damages in respect of three distinct causes of action, namely, malicious proceedings in bankruptcy, libel and slander, and trespass. Upon the first trial the plaintiff succeeded in obtaining damages for a substantial amount, but the finding of the jury being deemed unsatisfactory, a new trial was ordered. At the second trial the plaintiff obtained a finding in his favour as to the claim for libel, the damages being assessed at one farthing; but the jury found for the defendants as to the other causes of action. A motion being made to deprive the plaintiff of costs, this Court held upon appeal that there was jurisdiction in the divisional Court to order that they should not be taxed in his favour. The defendants then

claimed the costs of the issues found by the jury in their favour, and the master considered that they were entitled to them, and the Exchequer Division affirmed this view. (1) I am of opinion that the judgment of the Court below was right.

I will briefly allude to the practice as to costs followed in the Courts of Common Law before the Supreme Court of Judicature Acts, 1873, 1875. Under the Common Law Procedure Act, 1852, s. 41, except replevin and ejectment, causes of action, by and against the same parties in the same rights, might be joined in the same suit. Pursuant to the provisions of that and other statutes, the defendant might, as regards some defences without and others with leave, plead several defences. The plaintiff, if he succeeded as to any of the causes of action alleged by him, was entitled to the general costs of the cause, although this right, if the damages recovered were small, was controlled to some extent by certain statutes, such as 43 Eliz. c. 6, s. 2; 21 Jac. 1, c. 16, s. 6; 3 & 4 Vict. c. 24, s. 2; and the statutes relating to the County Courts, the most recent of which was the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5. The defendant, however, was entitled to all the costs of the issues as to which he obtained the verdict. The expression "to follow the event," or "to abide the event," was, in regard to costs, an expression in common use in agreements of reference; and when costs of the cause were expressed to follow or abide the event, they would have been distributed in the manner I have described.

Under the Supreme Court of Judicature Acts, 1873, 1875, the power conferred upon a plaintiff of joining distinct causes of action is regulated by Order XVII., and it may be remarked that the rules of that order certainly do not limit the right previously existing under the Common Law Procedure Act, 1852. Again issues may have been done away with in the old sense of the word strictly used; but in a very similar sense they still remain. Their existence is clearly contemplated by Order XIX., rules 18, 21; Order XXVI. and Order XXXVI., rules 26, 27, 29. No doubt, before the Judicature Acts, 1873, 1875, besides issues occurring in an action at common law, there were issues which did not so arise: as for instance, issues of interpleader, and issues directed by the Court of Chancery and by the Court of Probate under

(1) Ante, p. 15.

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20 & 21 Vict. c. 77, s. 35; but the orders, which I have mentioned, clearly relate to issues arising in an action brought in the High Court. This being so, it is reasonable to suppose that the legislature would leave unaltered a practice as to the taxation of costs upon issues arising in an action where it did not appear that the practice required to be amended. Now by Order LV. the practice as to costs formerly prevailing in the Court of Chancery is introduced into the Common Law divisions of the High Court, and they are placed in the discretion of the Court, but subject to the proviso as to trials by a jury, which directs that unless the judge or Court shall otherwise order, costs shall follow the event. This proviso may be construed in more modes than one. It may be argued that if the plaintiff succeeds as to any part of his claim, he is entitled to all the costs, although he has failed as to material portions of his claim; and it may also be argued that if each party partly succeeds, neither is to have any costs. Either of these contentions if acceded to would be sufficient to deprive the defendants of their costs: but I cannot think that either is right. It appears to me more reasonable to give to the language used the meaning which it bore prior to the Judicature Acts. The "event" of an action is complex, and the word, as used in the proviso to Order LV., may be read distributively: it must be so read as regards distinct causes of action according to the view of the Exchequer Division (1) and, in my opinion, the general costs of the cause follow the judgment, but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them. I am glad to know that this view is in accordance with the practice which has been followed, and that it is to some extent supported by the authorities decided, since the Judicature Acts. In *Blake* v. *Appleyard* (2) it was held that although a plaintiff might be entitled to the costs of the cause generally, yet the defendant was entitled to the costs of his counter-claim. In *Davidson* v. *Gray, Barrow, & Co.* (3) it seems to have been considered that although the finding was in favour of the plaintiff, the defendants ought to have the costs of the counter-claim upon which they substantially succeeded. The language of the judgment of this Court in *Berdan* v. *Greenwood* (4) is not

(1) Ante, p. 15.
(2) 3 Ex. D. 195.
(3) See note at end of case.
(4) 3 Ex. D. 251. at p. 257.

decisive as to the present question; but it may be cited as further illustrating the view which has been hitherto taken.

I am of opinion that the decision of the Exchequer Division was right and ought to be affirmed.

Appeal dismissed. (1)

Solicitors for plaintiff: *G. S. & H. Brandon.*
Solicitor for defendants: *J. Hands.*

(1) DAVIDSON *v.* GRAY, BARROW, & CO.

Action to recover 51*l.* due for freight. The defendants having paid 41*l.* 2*s.* 11*d.* into court admitted by their defence the plaintiff's claim for 51*l.*, but claimed by way of counter-claim the sum of 9*l.* 17*s.* 1*d.* for injury to the cargo. The action having been remitted to Westminster County Court for trial under 19 & 20 Vict. c. 108, s 26, the registrar certified the result to be a finding for the plaintiff for 16*s.* The plaintiff got from a master a judgment signed for that sum with costs.

Application was made to the master by the defendants to tax the costs according to the issues, of which they contended that they had won all those raised by the counter-claim, and that, the plaintiff's claim being admitted, there was no issue found for the plaintiff.

The master declined so to tax upon the certificate as it stood, but stayed the taxation to enable the defendants to apply to the Court to have the certificate amended by distributing the findings upon the issues.

1879. March 17. *J. A. McLeod*, for the defendants, moved accordingly.

Bucknill, for the plaintiff.

THE COURT (Cockburn, C.J., and Mellor, J.) were of opinion that a material issue having been decided in the defendants' favour, an opportunity ought to be afforded them of obtaining their costs upon it. The general conclusion as to the sum of 16*s.* was for the plaintiff, but the defendants had established all the rest of their counter-claim.

Motion granted.

The plaintiff appealed.

April 9. *Edward Pollock*, for the plaintiff, contended that as the plaintiff had recovered 16*s.* more than the amount paid into court, he was entitled to the costs.

J. A. McLeod, for the defendants.

THE COURT (Brett, Cotton, and Thesiger, L.JJ.) held that the Queen's Bench Division in its discretion might direct the registrar to give a new certificate; that the defendants would have been entitled to the costs of the counter-claim if there had been a specific finding, and that the course taken in the Queen's Bench Division was reasonable.

Appeal dismissed.

Solicitors for plaintiff: *Ingledew, Ince, & Greening.*
Solicitor for defendants: *Wm. Beck.*

1880
March 9.

ASHENDON *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Railway Company—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Notice—Limiting Liability—Reasonable Conditions.*

A condition that a railway company will not be liable "in any case" for loss or damage to a horse or dog above certain specified values delivered to them for carriage unless the value is declared, is not just and reasonable within sect. 7 of the Railway and Canal Traffic Act, 1854, as it is in its terms unconditional, and would, if valid, protect the company even in case of the negligence or wilful misconduct of their servants.

The case of *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (2 B. & S. 122; 31 L. J. (Q.B.) 113), deciding that such a condition is reasonable, is overruled by *Peek* v. *North Staffordshire Ry. Co.* (10 H. L. C. 473; 32 L. J. (Q.B.) 241).

Special Case stated in an action tried at the county court of Sussex, holden at Brighton, from which the following facts appeared:—

The plaintiff delivered an Italian greyhound to the defendants' servants at the Brighton station to be conveyed by the defendants on their railway to Norwood Junction, and from thence by the London, Chatham, and Dover Railway Company to Rochester, and at the same time the plaintiff signed a printed ticket in the form required by the defendants to be signed by persons sending dogs by their railway. The ticket contained the following conditions:—

"Received the annexed ticket, subject to the following conditions:—The company will not be liable, in any case, for loss or damage to any horse, or other animal, above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent, at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared. The company will in no case be liable for injury to any horse, or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per

cent., or 6*d.* per pound, upon the declared value above 40*l.*, whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried."

No declaration of the value of the dog was made, and no additional fare was paid by the plaintiff.

During the transit the dog was lost without any neglect or default on the part of the defendants or the London, Chatham, and Dover Railway Company. The county court judge, however, was of opinion that the conditions on the ticket were unjust and unreasonable, and gave judgment for the plaintiff for 10*l.* 10*s.*

The question for the opinion of the Court was whether the plaintiff was entitled to recover in the action.

June 13, 1879; Mar. 2, 1880. *Lopes,* for the defendants. The condition is the same as that which in *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (1) was held to be reasonable, and that decision is not affected by *Peek* v. *North Staffordshire Ry. Co.* (2)

Fillan, for the plaintiff. The decision in *Peek* v. *North Staffordshire Ry. Co.* (2) turns upon this, that a notice similar to the one in this case covers all negligence, or even fraud or dishonesty, on the part of the carrier, and the former case of *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (1) is in effect though not in terms overruled.

Lopes, in reply. Even if the plaintiff's contention as to the condition is correct, there is here an alternative offered, since the defendants will carry uninsured animals at their ordinary rate, or will insure at the rates mentioned in the condition. *Lewis* v. *Great Western Ry. Co.* (3) is an authority that in such case a condition exempting the railway company from liability when carrying at the lower rate is reasonable. Further, in *Peek* v. *North Staffordshire Ry. Co.* (2), the condition applied to all marbles independently of their value, here the condition only applies to dogs above the value named.

Cur. adv. vult.

(1) 2 B. & S. 122; 31 L. J. (Q.B.) 113.

(2) 10 H. L. C. 473; 32 L. J. (Q.B.) 241.

(3) 3 Q. B. D. 195.

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March 9. The following judgments were delivered:

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KELLY, C.B. In this case I am of opinion that the plaintiff is entitled to the judgment of the Court. The case is simply this. The plaintiff delivered a dog to the defendants to be conveyed by them, and on receipt of the dog in the usual way a ticket was delivered to the plaintiff, containing an agreement upon the terms of which depends the answer to the question whether the plaintiff is entitled to recover in this action or not. If it is a reasonable agreement the defendants are entitled to succeed, but if it is not the plaintiff is entitled to our judgment. The question whether it is a reasonable agreement depends on the terms used. If they are absolute and unconditional to the effect that the company shall not be liable in any event, it is clear on the authority of *Peek* v. *North Staffordshire Ry. Co.* (1), that the plaintiff is entitled to recover. The question therefore is whether the agreement when fairly construed is, in its terms, absolute and unconditional, or whether certain qualifications or exceptions such as that the company are to be liable only in case of gross negligence, or for the wilful misconduct or felony of their servants, are to be read as included in this agreement. If a few words had been added importing those qualifications, this would have been a lawful agreement. In the absence of those words, I think the agreement is clearly unreasonable, because it provides not only for the accident that occurred without negligence but is absolute in its terms that, in no case, shall the company be liable. Under these circumstances without going into the decisions or the conflict of opinion that there has been, it is sufficient for me to say that on the authority of *Peek* v. *North Staffordshire Ry. Co.* (1) and on the construction of this agreement it is unreasonable and not binding on the plaintiff.

My Brother Hawkins has shewn me a judgment which he has prepared, going more into detail than I have done, and with which I entirely agree, but at the same time I desire to limit my judgment to the simple question, on which I have already given an opinion, whether this agreement is or is not, on the authority of the cases cited to us, a reasonable one. I am of opinion that it is not, and that our judgment should be for the plaintiff.

(1) 10 H. L. C. 473; 32 L. J. (Q. B.) 241.

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HAWKINS, J. This action was brought in the county court at Brighton, to recover from the defendants the sum of 10*l.* 10*s.* the value of an Italian greyhound intrusted by the plaintiff to their care to be carried by them as common carriers from Brighton to Rochester (by their own and the London, Chatham, and Dover lines of railway), and which during its transit, without any negligence or default of the defendants or their servants, was accidentally lost. The defendants denied their liability upon the ground that the dog was carried by them upon a special contract; which, under 17 & 18 Vict. c. 31 (the Railway and Canal Traffic Act, 1854), was effectual to protect them, at least from the loss which actually happened. The facts are so clearly stated in the special case, that I do not think it necessary to repeat them. The matter was argued before us with great ability. On the part of the plaintiff by Mr. Fillan, who, admitting that *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (in the Exchequer Chamber) (1), was in point against his case, contended that that authority was virtually overruled in the House of Lords by *Peek* v. *North Staffordshire Ry. Co.* (2) On the other hand Mr. Lopes contended that *Harrison's Case* (1) still remained law; and in support of this contention he cited the recent case of *Lewis* v. *Great Western Ry. Co.* (3)

After a careful consideration I am of opinion that the plaintiff is entitled to our judgment. There can be no question that the contract under which the dog was delivered to and received by the defendant was—if just and reasonable—in its terms sufficient to exempt them from all liability for its loss; no matter how that loss was occasioned; for its value (being above 5*l.*) was not declared, and no increase of the ordinary price for the carriage of dogs above the value of 5*l.* was either demanded or paid. The plaintiff, however, alleges that the contract is not a just and reasonable one, so as to satisfy the requirements of 17 & 18 Vict. c. 31, s. 7. Whether it is or is not is the sole question we have to determine. To me it seems that this question is concluded by the case of *Peek* v. *North Staffordshire Ry. Co.* (2) above

(1) 2 B. & S. 122; 31 L. J. (Q.B.) 113.

(2) 10 H. L. C. 473; 32 L. J. (Q.B.) 241.

(3) 3 Q. B. D. 195.

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referred to, where it was expressly held that a condition exempting the company from responsibility for injury, however caused, without limitation or exception, was neither just nor reasonable; for such a condition would, if valid, exempt them from liability for loss or damage happening through the grossest, most culpable negligence, or even wilful misconduct. In my opinion, the condition relied on by the now defendants that they will not be liable "in any case" unless a declaration of value is signed and delivered to them at the time of booking (1), would equally in the absence of such declaration cover every loss however occasioned. The case of *Peek* v. *North Staffordshire Ry. Co* (2), is therefore decisive against the defendants, and being a decision of the House of Lords, we are absolutely bound by it. *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (3), must therefore, so far as it affects the question before us be considered as virtually overruled.

Had the defendants by their conditions stipulated, as they easily might in a very few words, simply that they would not be responsible for loss resulting from mere accident without neglect or default; such restriction of their common law liability would have been both just and reasonable, and if embodied in a signed contract, would have protected them against liability for the loss which occurred. We are not at liberty, however, to set aside as null and void, and exclude from our consideration so much of the condition as covers loss or damage by neglect or default, and apply it, as it might by a very slight alteration in its language have been applied, to mere accidental loss or injury, for that would be to turn an unreasonable into a reasonable contract. We are bound to construe the contract as we would have done at the moment it was made, without regard to subsequent events, and so construing it, it is clear that it was, as the law is now settled, unreasonable, for it was framed to cover every loss, even though

(1) It is to be observed that by the condition as stated in the special case, though the company require a declaration when the value of the dog is above 5*l.*, no additional price for conveyance of dogs between the value of 5*l.* and 40*l.* is required, the 2½ percentage being only stipulated for "upon the declared value above 40*l.*" (Note to the written judgment of Hawkins, J.)

(2) 10 H. L. C. 473; 32 L. J. (Q.B. 241.

(3) 2 B. & S. 122; 31 L. J. (Q.B.) 113.

occasioned by the wilful misconduct of the defendants or their servants.

The case of *Lewis* v. *Great Western Ry. Co.* (1) does not in the least degree militate against this view. There it was held that a contract on the part of the company to carry cheeses at a lower than the ordinary rate of carriage, on condition that the company should not be liable for loss arising from any cause, except the wilful misconduct of their servants, was a just and reasonable contract, for a consideration in the shape of a lower tariff was offered to the sender of the goods as an inducement to him to limit his common law right, and he had the option to send them at the ordinary rate of carriage, holding the defendants to their ordinary liability as carriers, or at a lower rate of carriage, taking upon himself the risk of injury happening to his goods in the course of their transit through any neglect or default of the company or their servants not amounting to wilful misconduct. Here no such inducement or option was offered. Moreover, in that case loss occasioned by wilful misconduct of the defendants' servants was expressly excepted from the condition, which is not the case in the contract now under consideration.

My opinion therefore is, that the county court judge was right in his decision. The judgment entered for the plaintiff will, therefore, stand confirmed, with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Smith, Fawdon, & Son, for Lamb & Evett, Brighton.*

Solicitors for defendants: *Norton, Rose, Norton, & Brewer.*

(1) 3 Q. B. D. 195.

1880
March 15.

METROPOLITAN INNER CIRCLE RAILWAY COMPANY *v.* METROPOLITAN RAILWAY COMPANY.

Practice—Notice of Trial — Entry of Cause — Close of Pleadings — Order XXXVI., rules 3, 17 a.

A cause cannot be entered for trial under Order XXXVI. before the pleadings are closed.

MOTION by the defendants, on appeal from chambers, to strike the case out of the list of causes for London.

The action was brought on an award, and the defendants delivered a defence and counter-claim, to which, on the 2nd of February last, the plaintiffs delivered a reply, and at the same time gave notice of trial for the 12th of February, and on the next day set the action down for trial. On the 6th of February an order was made on a summons taken out by the defendants that the plaintiffs should amend their reply or give particulars, and on the same day it was ordered that the defendants should be at liberty to rejoin specially, and should have seven days after the amended reply was delivered in which to do so. The defendants subsequently took out a summons to strike out the entry of the cause for irregularity, on which the master declined to make an order, and his decision was affirmed on appeal to a judge.

W. Graham, moved. It cannot have been intended that an action should be entered for trial before it is ready, and Order XXXVI., rule 3 (1), must be taken to give the plaintiff a right to give notice of trial with the reply only when it closes the pleadings. Any other ruling would be inconsistent with the rights given to defendants by rules 3 and 4 of the same order, and would render it impossible to comply with rule 17 a, which requires

(1) Order XXXVI., r. 3: Subject to the provision of the following rules the plaintiff may, with his reply, or at any time after the close of the pleadings give notice of trial of the action, and thereby specify one of the modes mentioned in rule 2, and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or a judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried.

copies of the whole of the pleadings in the action to be delivered by the party entering it.

A. L. Smith, for the plaintiffs, contrà. The practice at chambers has been in strict accordance with the rule that the plaintiff may "with his reply" give notice of trial, and the rule is a convenient one, as otherwise the plaintiff would be at the mercy of the defendant who, by counter-claim, could throw the case over indefinitely. If the plaintiff can properly give notice, it follows that he must be able to give effect to that notice by entering the action. At any rate in this case the defendants by taking out a summons to amend the pleadings waived the irregularity if there was one. If the defendant is inconvenienced in his defence, he must make an application to postpone the trial, and he cannot limit the right of the plaintiff to enter the action for trial.

W. Graham, was not heard in reply.

KELLY, C.B. I understand it to be admitted by both parties that the record is not yet completed. It would be a matter of regret if under the provisions of the Judicature Acts a plaintiff should be unduly delayed in the trial of his cause, but it would be equally to be regretted if a defendant should be disentitled to plead whatever he may plead bonâ fide in his defence, and in any form that may be necessary to raise that defence, whether his doing so may protract the pleadings or not. Now let us look at what these rules are. In the first place there is Order XXXVI., rule 3. In this case the plaintiffs have accepted the first alternative, and given notice of trial with the reply. I agree they had a right to do so, and that the defendants had no right by pleadings or in any other way to delay the natural and legitimate course of the case from the time of this notice until it should come on for trial. But the plaintiffs also entered the cause for trial. This they have done at their peril, and at a time when they were unable to comply with the provisions of rule 17 a of the same order, by delivering two copies of the whole of the pleadings in the action to the officer who enters it for trial. I am of opinion that though the plaintiffs had a right to give notice of trial, they could not in this case enter the cause for trial. It would be absurd to suppose that the legislature could ever have contem-

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plated a rule which would have the effect of depriving parties of pleading that which they may be entitled to plead, and allowing the cause prematurely to come to trial before the record is complete. Under these circumstances the appeal must be allowed.

STEPHEN, J. I am of the same opinion, though I arrive at it in a somewhat different mode. It appears to me that the proper meaning of rule 3 is that the plaintiff may give notice with his reply if that closes the pleadings, or at the close of pleadings if they are more protracted; that seems to me the correct way of interpreting rule 3, and it would appear to make all the other rules consistent, and to arrive at the natural result that notice of trial should not be given till the pleadings are completed. It is said that another rule has sprung up at chambers, which is convenient because it discourages defendants who counter-plead in an evasive manner from unduly spinning out proceedings. I do not think we ought to construe rules in this manner. The reasonable view seems to be this: notice of trial not to be given until the record is complete, and though this may give rise to inconvenience by giving an opening to defendants who wish to avoid just claims, that is an inconvenience which is not separable from the whole principle of the Judicature Acts. As to the waiver, I hardly think the principle laid down applies to a case of this sort. I do not think the waiver of a mere irregularity could force a party to go to trial on an imperfect record, upon which the judge before whom it came would not know how to decide or how to direct a jury. Upon these grounds I think the appeal must be allowed.

Order absolute.

Solicitors for plaintiffs: *Newman, Stretton, & Hilliard.*
Solicitors for defendants: *Burchells.*

[IN THE COURT OF APPEAL.]

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March 13.

THE TUNBRIDGE WELLS LOCAL BOARD *v.* AKROYD.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 179, 180, 257—*Local Board—Expense of paving Street—Award—Liability of Frontager not a party to Arbitration.*

An award in an arbitration under the Public Health Act, 1875, between one of several frontagers called upon to pay the expense of paving a street and an urban authority, by which the arbitrator has altered not merely the assessment upon the particular frontager, but the assessment in regard to all the frontagers, is not binding upon any frontager not a party to the arbitration, so as to entitle the urban authority to recover from him the sum which would be due from him on the footing of the altered assessment.

Special Case stated in an action brought in the County Court of Kent at Tunbridge Wells, to recover 10*l.* 5*s.* 4*d.* "in respect of the sewering, levelling, metalling, paving, and channelling a street called Broadwater Down Road, within the plaintiffs' district." The following are the facts material to be stated:—

The plaintiffs were the urban sanitary authority under the Public Health Act, 1875, for the district of Tunbridge Wells. The defendant was the owner within the meaning of that Act of premises abutting upon the street or highway called Broadwater Down Road, within the district. Broadwater Down Road was a street or highway not repairable by the inhabitants at large. On the 9th day of May, 1876, the plaintiffs served the defendant with a notice under the 150th section of the Public Health Act, 1875, to sewer, level, pave, flag, and channel the street or highway within the time and in the manner specified in such notice, and according to plans and sections deposited in the office of the urban sanitary authority at the Town Hall in Tunbridge Wells. The street or highway not being sewered, levelled, paved, flagged, and channelled by the defendant and the other owners of premises abutting upon the highway in pursuance of the notices served upon him and them in that behalf, the plaintiffs as urban sanitary authority, after the expiration of the time mentioned in the notices, themselves executed the works therein referred to, and properly expended in and about the

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works 4036*l.* 15*s.* 11*d.* An apportionment was thereupon made by the surveyor of the plaintiffs of 4036*l.* 15*s.* 11*d.* upon the owners of the premises abutting upon the road according to their frontages, and the sum of 80*l.* 12*s.* 6*d.* was apportioned upon the defendant as his share. Notice in writing of such apportionment under the hand of the surveyor and clerk of the plaintiffs was served upon the defendant on or about the 23rd of July, 1877, and in the notice it was stated that the apportionment of 80*l.* 12*s.* 6*d.* upon the defendant would be binding and conclusive upon him, unless within the expiration of three months from the date of the notice he should by notice in writing to the plaintiffs as the urban authority dispute the same. The defendant did not within the three months, or at any time, give notice to the urban authority of any intention to dispute the surveyor's apportionment, and on the 3rd of October, 1877, the defendant duly paid to the plaintiffs the sum of 80*l.* 12*s.* 6*d.*

Certain owners of premises abutting upon the road gave notice to the plaintiffs of their intention to dispute the apportionment made by the surveyor upon them, and in pursuance of the Public Health Act, 1875, such owners and the plaintiffs agreed that such disputes should be referred to an arbitrator. The arbitrator by his award made a re-apportionment amongst all the owners of premises abutting upon the road (the defendant amongst the number) of the 4036*l.* 15*s.* 11*d.* aforesaid, and in such re-apportionment he apportioned 90*l.* 17*s.* 10*d.* as the amount chargeable to the defendant in respect of his premises abutting upon the road, instead of the 80*l.* 12*s.* 6*d.* apportioned by the surveyor as aforesaid. The defendant had no notice of the proceedings taken before the arbitrator, nor of the agreement between the owners aforesaid and the plaintiffs to refer the matters then in dispute betweeen them, nor was the defendant in any way a party to the arbitration, and the award was made entirely without his knowledge, approbation, or consent. A notice in writing of the re-apportionment from the local board to the defendant was served upon him by the plaintiffs on the 26th of April, 1878, which was the first time notice was given to him of the same, and a demand was then made upon him for payment of the sum of 90*l.* 17*s.* 10*d.*, being the amount so re-apportioned upon him as aforesaid. The

plaintiffs had credited the defendant with the sum of 80*l.* 12*s.* 6*d.* so paid as aforesaid, and the sum of 10*l.* 5*s.* 4*d.* claimed in this action, was the difference between the surveyor's apportionment and the amount re-apportioned by the arbitrator. The county court judge was of opinion that the plaintiffs were entitled to recover from the defendant the amount apportioned upon him by the arbitrator, and he gave judgment for the plaintiffs for the amount claimed.

The question for the opinion of the Court was whether this judgment was right.

May 16, 1879. *Webster, Q.C.* (*Erskine Pollock*, with him), for the plaintiffs.

Cave, Q.C. (*Edward Pollock*, with him), for the defendant.

KELLY, C.B. I am clearly of opinion that the defendant is not liable, and that the sum in question cannot be recovered from him. Express power is conferred upon the board to recover the amount assessed by their surveyor against any frontager, who shall fail to pay that amount or to object to it within three months; and, if the matter be referred, the award of an arbitrator or umpire is made final and binding on all parties to the reference, and therefore the amount awarded may undoubtedly be recovered by the board against all or any parties or party to the reference; but the Public Health Act, 1875, is wholly silent as to any right in the board to demand, or upon the liability of any one whomsoever to pay, any sum of money except the amount of the surveyor's assessment, in case it shall not be objected to within three months, and the sum found and awarded by the arbitrator against any party or parties to the reference. And I am not aware that any power is conferred by any Act of Parliament, and assuredly no power is conferred by the common law upon any persons, incorporated or unincorporated, to recover by action against any subject of this realm any money, or land, or goods, or other property, at law or in equity, without the party sought to be made liable having the opportunity of appearing before the Court in which the proceeding is instituted, and of being heard by himself or his counsel in his defence against the

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claim made upon him. And I must say that it appears to me, not only a violation of one of the first principles of the law of England, but also neither more nor less than an outrage upon justice, to hold that a court of law, or an arbitrator, or any other tribunal in in this country, can adjudge a man to lose his money or his land without being heard or having the means of being heard in his defence. The Act of Parliament, upon which these proceedings have taken place, is certainly framed in a manner calculated to create many and great difficulties in the discharge of their duties by an urban authority in cases like that which is now before the Court. They have, indeed, power to recover against the frontagers the sums assessed by the surveyor if their amount be undisputed; but if a single frontager (of whom it is said there are fifty-one in this case) object to the assessment of the surveyor, the board have no choice, and, in order to recover the contribution to which he may be liable, must proceed under the the arbitration clause. In the first place, therefore, the objector, unless he can agree with the board upon the appointment of a single arbitrator, is entitled to appoint one arbitrator, and the board to appoint another. What then is to be done if, instead of the four objectors who in this case have all agreed upon the appointment of a single arbitrator, each of the fifty-one frontagers shall insist upon the appointment of his own arbitrator? There must either be as many arbitrators as there are objectors, in which case it would be obviously impossible to give effect to the Act of Parliament, or there must be, we may suppose, twenty or more arbitrators on the one side appointed by the objectors, and either one and one alone, or a substantial number appointed by the board. And in the case of a difference of opinion among them, as there is no provision for an award by the majority, they must all agree upon an umpire or a number of umpires. I see no escape from the difficulties and the confusion which would thus be created, unless we are to apply some provisions applicable to such a case, but which are not found in the Act of Parliament. And here the startling difficulty occurs, whether the objector or objectors who demand the arbitration be one or twenty in number, the award, to be of effect, must be one only, for it must deal with every frontager's amount of liability, and the whole together must amount to the aggregate sum, an

arbitrator having no power to alter or deal with the amount expended. It is possible—but I forbear to pronounce any opinion upon the question, because it does not arise in this case—that where there are certain dissentients who insist upon the arbitration, and others who are content with the assessment of the surveyor and do not think fit to concur in the arbitration, inasmuch as the award of an arbitrator must be binding upon the whole body of frontagers or upon none, a power may be implied in the board to give notice to all who have not objected, and so who are no parties to the arbitration, that they may appear before the arbitrators and contest the amount each of his own liability. But there is no such express power in the Act, and if there were it has not been exercised in the present case. However that may be, we come back to the question, Where is there a provision in the Act of Parliament enabling the board to recover this sum of 10*l.* 5*s.* 4*d.*? Not by the clause enabling them to recover the amount of the assessment of the surveyor, because that amount is 80*l.* 12*s.* 6*d.* and no more, and has been paid. Nor is there any power to recover the amount assessed by the arbitrator except against the parties to the reference. It was urged at the bar that if this be so the board have no power to recover the entire sum, which is admitted to have been correctly ascertained. But what has the defendant to do with this question? He has paid all that the surveyor reported him to be liable to, and no doubt the four objectors have paid all that the arbitrator has awarded against them, and all that can be said on this claim is that the Act contains no provision establishing the liability of the defendant to pay, or creating a power in the plaintiffs to recover it. They are, therefore, in the same condition as if a frontager had become insolvent and was unable to pay his contribution.

It was also insisted that the award is final and binding; and so it is as respects the four objectors who were parties to the reference. But where are there any words in the Act to make the award binding on any one else? Suppose the award to have diminished instead of increasing the amount of the assessment by the surveyor: would the defendant, and others who had acquiesced in and paid the amount of the surveyor's assessment, be entitled to recover back the difference between that amount and the lesser

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amount awarded by the arbitrator? The truth is that the Act of Parliament is so negligently and improvidently framed as to create great and formidable difficulties in carrying its provisions into execution. But this cannot justify the board in setting at nought the first principles of the law and constitution of this country by seeking to recover in a court of law or equity, or before any other tribunal, the property of the subjects of the realm without permitting them to appear and be heard in their defence.

HUDDLESTON, B. I regret that I cannot come to the same conclusion, and I hope that, in supporting the judgment of the county court judge, I am not infringing the principles of justice or those of the law of England.

Sect. 257 of the Public Health Act enables the local authority to recover the expenses incurred under s. 150 from the owners. The proportion of those expenses is to be ascertained by the surveyor in the first instance, who is to settle the proportion of the whole expenses according to the frontage of the respective premises of the owners, and, unless it be disputed within three months under the 257th section, the surveyor's apportionment becomes final and conclusive upon the owner. There is no notice required to be given to the owner that the surveyor is about to make the apportionment, nor is it enacted that the owners have any right to appear before the surveyor and claim to be heard by him; but if the apportionment of the surveyor is disputed, it must then be referred to arbitration in manner provided by the Act. It may be that the legislature thought that the decision of the officers of the urban authority ought not to be final as against the owner, and if any owner disputed it he might be entitled to a more independent tribunal, and it therefore provided that an arbitrator should be appointed under ss. 179, 180 of the Act; but then I think that the arbitrator or umpire so appointed is to be in substitution of the surveyor to re-apportion the amount of the compensation according to the frontage of the respective premises. As he has to re-apportion a fixed sum, it is obvious that the alteration of the amount payable by any one of the owners would require a corresponding alteration in that of all the others. As the parties were not entitled to go before the surveyor in the

first instance, so are they not entitled to go before the arbitrator, and therefore no notice need be given to all the respective owners. If injustice is likely to be done, there is power to appeal to the Local Government Board under s. 268.

It is clear to me that the finding of the surveyor, though acquiesced in by the defendant, is not final and binding on the board if any owner appeals, because, if an arbitrator be appointed, he must deal with the apportionment of the whole sum expended, and the objection that the defendant had no notice of the reference, and was not a party to it, cannot operate as a defence.

I think, therefore, that the plaintiffs are entitled to recover.

The defendant appealed to the Court of Appeal.

1879. Dec. 20. *Cave, Q.C.*, and *Hannen*, for the defendant. It is submitted that the decision of the county court judge, although approved of by Huddleston, B., was wrong, and that the judgment of Kelly, C.B., enunciates the principles properly applicable to the present case.

The question between the parties depends upon the true construction of the Public Health Act, 1875. By s. 150 an urban authority may by notice require the adjoining owners to put into good condition a street within its district, and if the notice be not complied with, the urban authority itself may execute the works and may recover in a summary manner the expenses incurred from the adjoining owners according to their frontages, in such proportion as may be settled by the surveyor or in case of dispute by arbitration. Sections 179 and 180 contain directions as to the procedure upon arbitrations. Sect. 257 enacts that where expenses have been apportioned by the surveyor, the apportionment is conclusive upon the owner, unless within three months he disputes the same. These provisions do not make the award of an umpire or of arbitrators binding upon a frontager who is not a party to the reference. In fact, the plaintiffs claim to make the defendant pay a sum of money pursuant to the award of a person, in whose appointment he had no voice, and from whose decision he has no means of appealing.

R. E. Webster, Q.C., and *Erskine Pollock*, for the plaintiffs. It

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is not to be presumed that a sanitary authority will commit an unjust act; for the members are an elected body (Public Health Act, 1875, s. 8), and represent all the ratepayers; if they misconduct themselves, they may be dismissed at the expiration of their term of office; they would naturally protect the interests of every ratepayer, and it is, therefore, unnecessary that the arbitration should have been between the sanitary authority and all the frontagers. The surveyor does not arbitrate, he only apportions; his apportionment is not conclusive as to the question of liability: *Hesketh* v. *Atherton Local Board* (1); and even as to the question of the amount to be paid it does not become binding until the period of three months has elapsed; upon notice within three months from one adjoining owner that he disputes the apportionment, the whole matter is at large, and if an error has been committed by the surveyor there must be a new apportionment upon all the frontagers by the arbitrator: *Cook* v. *Ipswich Local Board of Health* (2); and when an apportionment has been finally made, it cannot be disputed by any one: *Bayley* v. *Wilkinson* (3); *Nesbitt* v. *Greenwich Board of Works.* (4) Many provisions of the Public Health Act, 1875, appear to be in conflict with private rights; but the legislature intended that these should be disregarded in order that objects of public utility might be attained.

Cave, Q.C., in reply. The apportionment by the surveyor was not a nullity; therefore a new apportionment binding upon the defendant cannot be made by the arbitrator.

Cur. adv. vult.

1880. March 13. The judgment of the Court (Bramwell, Cotton, and Thesiger, L.JJ.) was delivered by

THESIGER, L.J. We are of opinion that this appeal must be allowed.

The only question raised by it is whether an award in an arbitration under the Public Health Act, 1875, between one of several frontagers called upon to pay the expenses of paving a

(1) Law Rep. 9 Q. B. 4.
(2) Law Rep. 6 Q. B. 451.
(3) 16 C. B. (N.S.) 161; 33 L. J. (M.C.) 161.
(4) Law Rep. 10 Q. B. 465.

street and an urban sanitary authority, by which award the arbitrator has altered, not merely the assessment upon the particular frontager, but the assessment in regard to all the frontagers, is binding upon any frontager not a party to the arbitration, so as to entitle the sanitary authority to recover from him the sum which would be due from him on the footing of the altered assessment. We say that this is the only question, because, as appears from the case and the documents referred to in it, the respondents (the sanitary authority) did not upon the award being made, even assuming that they could do so, take upon themselves to make a new assessment upon the lines of, and in the proportions settled by, the award, and thus to give each of the frontagers, who had not disputed the original assessment upon them, an opportunity, if so minded, of disputing in the manner provided by the Act, the new, but treated the award as absolutely binding and as settling, without further opportunity of dispute, the proportions in which all the frontagers were to pay. The particular frontager now appealing had, before the award in question was made, paid to the plaintiffs his proportion of the original assessment, but the learned county court judge, before whom this matter was tried, decided that he was liable to pay the additional sum claimed by the plaintiffs on the footing of the award, and upon appeal to the Exchequer Division, the Court being equally divided, the decision stood.

It is contended, on behalf of the plaintiffs, that upon the true interpretation of the Public Health Act, 1875, the decision is right. The sections of the Act, upon which the question mainly turns, are sects. 150, 179, 180, and 257. Section 150 is that from which the powers of the urban sanitary authority in the particular matter are derived. By virtue of its provisions they may in the case of a street within their district, not being a highway repairable by the inhabitants at large, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be paved, &c., require them to pave, &c., within a time specified in such notice; and the section further provides that: "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to

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therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act." Pausing for a moment upon these last words, it appears to us that the section has in view, not a dispute between the frontagers generally on one side and the urban authority on the other, but a dispute in which the owner of a particular set of premises complains of the apportionment as regards himself personally. The meaning, however, of this section and the machinery by which it is to be worked, are more fully explained by s. 257. From that section it appears that the surveyor having settled and apportioned the expenses of executing particular works, including works referred to in s. 150, for the repayment of which the owner of any premises is made liable, a notice of the amount settled by the surveyor to be due from such owner is to be served upon him, and a period of three months is given him within which he may by written notice dispute the apportionment. In the event of that period elapsing without the apportionment being disputed it becomes binding and conclusive upon such owner. This section is, it is true, one which relates, not merely to expenses incurred under s. 150, but also to other expenses, some of which would be incurred in reference to a single set of premises; but after making allowance for this fact we cannot but look upon the section as fortifying the view, that the dispute referred to in s. 150 is a dispute between a particular owner and the urban authority, and not one in which the frontagers generally would be interested; and the most natural as well as reasonable interpretation of both sections read together would be, that quoad any owner not disputing the apportionment of the surveyor within the prescribed period it becomes binding and conclusive, although another owner may have within the period disputed it. Sections 179 and 180, which regulate arbitrations, still further confirm this view. The former section provides that, "in case of any matter which by this Act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall

appoint an arbitrator to whom the matter shall be referred." This section again is a section referring to arbitrations generally, and not merely to arbitrations in respect of disputes referred to in s. 150; but if the arbitrations under that section had been intended to be, as it has been contended by the plaintiffs' counsel they are, arbitrations in which the arbitrators succeed to all the duties of the surveyor in the matter of the apportionment, and are bound to make an entirely fresh apportionment, binding when made upon all owners of premises liable to pay their proportion of the expenses of the work done, we cannot but think that the Act would have said so in plain terms; and would further have made some provision for giving the non-disputing owners notice of the arbitration, and an opportunity of protecting their interests in it. But when s. 180 is looked at, it is plain that its provisions are only calculated to protect the interests of the parties to a specific dispute, made the subject of the arbitration set on foot under s. 179, and the last sub-section of the latter section, when providing for the effect of the award, merely enacts that "the award of arbitrators or of an umpire under this Act shall be final and binding on all parties to the reference." It is said by the plaintiffs' counsel that the urban sanitary authority themselves represent the non-disputing owners, and can protect their interests; but practically this is impossible. Many an owner may have objections to a surveyor's apportionment, although he may be willing to pass them by sub silentio looking to the small proportion of the expenses which he is called upon to bear; but if that proportion were altered, and he were to be called upon to pay more, he might well determine to bring forward his objections; but how is he to exercise this option when he is ex concesso unaware that the apportionment is proposed to be altered, until it is done so by an award absolutely binding upon him? and how is the urban sanitary authority to represent and protect him in reference to objections arising from their own officer's apportionment, which he and they would naturally presume to be correct except in the particular matter made the subject of dispute? It appears to be admitted that every disputing owner may, and must, appoint an arbitrator, and that there must be as many separate arbitrations as there are disputing

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owners; and indeed, in the present case there were in form four separate arbitrations and four separate awards, although made by the same umpire. But, if so, which of these separate arbitrations and separate awards is to bind the non-disputing owners? And suppose, as might in theory at least be the case, awards given by different umpires and setting up different apportionments, what is to be done then? It really is no answer to this question to say that the umpire would in practice always be the same. The sections of the Act must be looked at and interpreted with reference to legal possibilities. Another difficulty in the way of the plaintiffs' contention occurs to us. Suppose that the day after the notice of the surveyor's apportionment is served, one of the owners charged disputes the apportionment, and he and the urban sanitary authority at once agree upon a single arbitrator. That arbitrator must, under the provisions of s. 180, make his award within two months. When, then, his award is made, the period of three months, within which owners may dispute the surveyor's apportionment, is still running; but, according to the plaintiffs' contention, the award is binding upon all owners, and consequently owners who intended, perhaps, to bring forward special objections of their own to the surveyor's apportionment, and objections which would equally apply to the arbitrator's apportionment, would, notwithstanding the currency of the period of three months, be shut out of any objection at all by virtue of an arbitration and award, of which they had no notice.

The difficulties indeed in the way of the plaintiffs' contention appear insurmountable: running counter as it does to well-established principles of law, it is at least to be required, before any Court should adopt it, that the language of the Act of Parliament, upon which reliance is placed, be clear and express upon the point; but it is impossible to say that such is the case here, and we prefer, under these circumstances, to follow the general law, rather than to interpret the language of the Act of Parliament in a manner contrary to the general law, in order to provide for a particular case, which it is quite possible may have escaped the attention of those who framed, and those who passed the Act. It is unnecessary for us to decide, what is the exact position of

the sanitary authority in cases where the surveyor's apportionment is deranged by the action of one of the frontagers, or whether in such cases, and by a different mode of proceeding to that adopted in the present case, the sanitary authority can obtain from the frontagers generally, whether they may have paid or not the proportion originally assessed upon them, such payments as the alteration of the proportion in the case of a particular frontager might be supposed to render necessary in the case of all. It is sufficient for us to say that the defendant is not bound by an award in an arbitration to which he was not a party, and of which he had not even notice, and consequently that the claim of the plaintiffs, based as it is upon that award, fails.

Appeal allowed.

Solicitors for plaintiffs: *Sole, Turner, & Knight, for W. C. Cripps & Son, Tunbridge Wells.*

Solicitors for defendant: *Collyer-Bristow, Withers, & Russell, for Stone & Simpson, Tunbridge Wells.*

[IN THE COURT OF APPEAL.]

March 11.

CRUMP *v.* CAVENDISH.

Practice—Writ specially Indorsed—Rules of Supreme Court, 1875, *Order XIV., rules* 1, 3—*Leave to defend upon bringing the Sum claimed into Court.*

Where a summons has been issued under Order XIV., the defendant, if he makes no affidavit of merits, is not entitled as matter of right to defend the action upon offering to bring the sum claimed into court. A discretion is vested in the judge to decide whether, upon considering the other facts of the case, the defendant's offer is a sufficient ground for refusing the plaintiff's application.

THIS was an action to recover the sum of 39*l.* 14*s.* 2*d.* for goods sold to the defendant between April, 1873, and January, 1875. The writ of summons was issued upon the 6th of December, 1879. The defendant having appeared, the plaintiff took out a summons under Rules of the Supreme Court, 1875, Order XIV., rule 1, and at the hearing before the master produced an affidavit verifying the causes of action. The defendant did not shew cause against the plaintiff's application by any affidavit, but contended that as

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part of the plaintiff's claim appeared by the indorsement upon the writ to be barred by the Statute of Limitations, the defendant was entitled to defend without making any affidavit. The plaintiff relied upon certain letters from the defendant, as containing acknowledgments of the whole debt sufficient to defeat the operation of the Statute of Limitations. The master gave the defendant leave to defend. On appeal to Field, J., the defendant offered to bring the whole amount claimed into court, but the learned judge reversed the order of the master, and directed that the plaintiff should be at liberty to sign final judgment, unless 39*l.* 14*s.* 2*d.* should be paid to the plaintiff in a week. The defendant gave notice of motion to the Exchequer Division to set aside the order of Field, J., and for leave to defend the action on payment into court of the amount of the plaintiff's claim. At the hearing, the judges (Kelly, C.B., and Lopes, J.) were divided in opinion, and no order was made. The defendant appealed to this Court.

Reginald Brown, for the defendant. The order of Field, J., is bad in form. It is irregular to direct that the debt shall be paid to the plaintiff herself. The proper form of order would be to direct the money to be brought into court. Moreover, as a part of the plaintiff's claim was disputed, there was no power to order the whole amount to be brought into court: *Dennis* v. *Seymour*. (1)

[THE COURT intimated that the form of the order made by Field, J., could not be questioned.]

Then, upon the construction of the rules contained in Order XIV. (2), it is submitted the defendant is entitled to defend

(1) 4 Ex. D. 80.

(2) By Rules of the Supreme Court, May, 1877, Order XIV., rule 1 (the original rule being repealed), "Where the defendant appears to a writ of summons specially indorsed under Order III., rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a judge may thereupon, unless the defendant, by affidavit or otherwise,

without making any affidavit, upon bringing the amount claimed into court. The plaintiff has full security for the debt, if she succeeds in proving her claim, and no valid reason can be assigned why the defendant should not have an opportunity of establishing such defence as he may be able to prove.

[BAGGALLAY, L.J. The language of Order XIV., rule 3, is different from that of the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), s. 2, which provides that the judge "shall . . . . give leave to appear to such writ and to defend the action on the defendant paying into court the sum indorsed on the writ." Under that statute the judge has no discretion; but the words of Order XIV., rule 3, are not imperative; and they allow a judge to exercise his discretion whether a mere offer to pay the amount claimed into court is sufficient to entitle the defendant to get leave to defend.]

It is submitted that the difference of language is not intentional, and that a judge has no more discretion under Order XIV., rule 3, than he has under the Summary Procedure upon Bills of Exchange Act, 1855, s. 2.

Holmes Poulter, for the plaintiff, was not called upon to argue.

BRAMWELL, L.J. This appeal must be dismissed. It cannot be a right construction of Order XIV. that the defendant may surmise that there is no defence, and yet by paying money into court keep the plaintiff until after the trial from obtaining that which is admittedly due to her. I think that Order XIV. will not bear the interpretation contended for on behalf of the defendant. The words of rule 3 are "may shew cause . . . . by offering to bring into court the sum indorsed," that is, may urge as one reason why he should have liberty to defend the

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satisfy the Court or a judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly."

By Rules of the Supreme Court, 1875, Order XIV., rule 3, "The defendant may shew cause against such application by offering to bring into Court the sum indorsed on the writ or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and, if so, to what part, of the plaintiff's claim."

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action. They do not mean that upon an offer of that kind a judge is bound to refuse the plaintiff's application. To bring the sum claimed into court is a circumstance connected with the defendant's case, which no doubt a judge is bound to take into his consideration; but it is not decisive in the defendant's favour. He is bound to shew that he has some reasonable ground of defence to the action. It is very plain to me that the appeal must be disallowed.

BAGGALLAY, L.J. I think that it was intended to give a discretion whether, upon bringing into court the sum claimed, the defendant ought to have leave to defend. There may be good grounds for allowing the plaintiff to obtain payment of the debt at once.

THESIGER, L.J. I agree with the view taken by the other members of the Court. The object of Order XIV. was to prevent delay in obtaining payment of a just claim. The contention urged on behalf of the defendant is erroneous. The words "may shew cause" imply that a discretion is vested in the judge who hears the summons. He has to form an opinion as to the facts before him, and he is to stay his hand only if he is satisfied that the defendant has a good defence on the merits, or thinks the facts disclosed by the defendant sufficient to entitle him to be permitted to defend the action. In many cases the offer to bring money into court is a sign of the existence of such facts, if not of a good defence; but not in all.

Appeal dismissed.

Solicitors for plaintiff: *Hunter & Downes.*
Solicitors for defendant: *F. Heritage & Co.*

THE OVERSEERS OF THE POOR OF THE PARISH OF LIVERPOOL, APPELLANTS; THE VISITORS OF THE COUNTY LUNATIC ASYLUM OF LANCASTER AND THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER, RESPONDENTS.

1880
April 13.

Poor—Pauper Lunatic—Lunatic Asylums Act, 1853 (16 & 17 *Vict. c.* 97), *s.* 80—*Adjudication of Settlement—Liability of Parish to remove from Asylum.*

When the visitors of an asylum have ordered a pauper lunatic confined therein to be discharged therefrom under s. 80 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), the overseers of the parish from which the lunatic was sent to the asylum are bound under that section to remove him to their parish, although it has been adjudged that the lunatic was not settled in that parish and that it could not be ascertained in what parish he was settled.

SPECIAL CASE stated by consent and by a judge's order under 12 & 13 Vict. c. 45.

On the 11th of March, 1878, Thomas Noon was taken to the workhouse of the parish of Liverpool by the police, having been found wandering in the streets of that parish, and on the 13th was, pursuant to the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), duly transferred as a pauper lunatic to the County Lunatic Asylum at Lancaster, under a justice's order. On the 30th of May following an order of justices was duly made under s. 98 of that Act, adjudging that the lunatic was not settled in the parish of Liverpool, that it could not be ascertained in what parish, township, or place he was settled, and that he was legally chargeable as a pauper lunatic to the county of Lancaster. The visitors of the asylum afterwards duly made an order for the discharge of the lunatic from the asylum, having duly served the overseers of the parish of Liverpool with notice of their intention to do so. The overseers were requested to remove the lunatic, but refused to do so, and on the 19th of October, 1878, were summoned before the justices at Lancaster at the instance of the visitors under s. 80 of the Act, for such refusal, when they urged that s. 80 was not applicable, on the ground that the lunatic had been adjudged to be a lunatic not settled in the parish of Liverpool and not having an ascertainable settlement elsewhere, and had been down to the time of the order of discharge detained in the asylum under the order of the 30th of May.

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OVERSEERS OF LIVERPOOL v. LANCASTER LUNATIC ASYLUM.

The lunatic still continued to be chargeable to the county in pursuance of that order, and was still of unsound mind and not fit to be at large, but at the time of the order of discharge, and still, was, fit to be removed to and confined in the lunatic wards of a workhouse.

The justices being of opinion that the visitors were entitled to discharge the lunatic and to give the notice thereof, and that the overseers were not entitled to refuse to remove the lunatic, and that the case came within s. 80, convicted the overseers in a penalty of 20*s.*, whereupon they appealed under s. 123.

If the Court should be of opinion that the overseers were bound to remove the lunatic in pursuance of the notice, the conviction was to be affirmed; if, of a contrary opinion, to be quashed.

W. Graham, for the appellants. The overseers did not think it right to burden the parish with the expense of the lunatic without a decision of the Court. Under s. 98, if a pauper lunatic be not settled in the parish by which he is sent to an asylum he may be adjudged by the justices to be chargeable to the county. By s. 79, any three visitors of an asylum may discharge a pauper lunatic from the asylum. Sect. 80 (on which the question in the case turns) (1), only applies to a case where it has been adjudged that a lunatic is settled in a parish, for the words "or if no such adjudication shall have been made," cannot include a case where there has been an adjudication. Here there has been an adjudication that the lunatic was not settled in the parish of Liverpool,

(1) Sect. 80 of the Lunatic Asylums Act, 1853, (16 & 17 Vict. c. 97): "When the visitors of any asylum shall order a pauper lunatic confined therein to be discharged therefrom, it shall be lawful for them, when they shall see occasion, to send notice in writing signed by their clerk, through the post or otherwise, of their intention to discharge such lunatic, to the overseers of the parish wherein it shall have been adjudged that such lunatic is settled, or if no such adjudication shall have been made to the overseers of the parish from which such lunatic shall have been sent to such asylum, unless such lunatic shall be chargeable to the common fund of any union, and in any such last-mentioned case to some one relieving officer of such union; and upon receipt of such notice the overseers or relieving officers respectively shall cause such lunatic, upon his discharge, to be forthwith removed to their parish or to the workhouse of the union at the cost and charge of their parish or of the common fund of the union as the case shall require;" under a penalty not exceeding 10*l.*

and the case therefore does not, in the appellant's view, fall within s. 80. There is a further difficulty in seeing what funds are to be applied to his maintenance, for under s. 95 he is chargeable to the parish of Liverpool only until the parish has established "that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled." Here there has been an adjudication that it cannot be ascertained in what parish the lunatic is settled, and thereupon he ceased to be chargeable to the parish of Liverpool.

R. S. Wright, for the respondents, was not heard.

KELLY, C.B. I think the language of s. 80 of the Act is quite clear, and gives rise to no difficulty. If a lunatic has been adjudged to be settled in a parish that parish must upon due notice remove him from the asylum; if not, the parish from which he was sent to the asylum must remove him. That is the case here, the lunatic not having been adjudged to be settled in any other parish, the parish of Liverpool, from which he was sent to the asylum, must remove him. The conviction therefore was right.

HUDDLESTON, B., concurred.

Conviction affirmed.

Solicitors for appellants: *Monckton, Long, & Co.*
Solicitors for respondents: *Bower & Cotton.*

1880
Jan. 28.

[IN THE COURT OF APPEAL.]

THE ATTORNEY GENERAL *v.* THE METROPOLITAN DISTRICT RAILWAY COMPANY.

Practice — Evidence by Affidavit or Orally — Rules of Equity Exchequer, 14th March, 1866, X. 2, 3.

An information was filed on the Equity side of the Exchequer Division to recover passenger duty from a railway company, the question in dispute being whether certain trains run by the company were cheap trains, within the meaning of the Act exempting from passenger duty the fares for the conveyance of passengers at fares not exceeding one penny per mile by cheap trains. The company applied to have the evidence taken orally :—

Held, reversing the decision of the Exchequer Division, that the evidence ought to be taken orally, as it was desirable that in such a case the Court should be able to obtain immediate information and explanations by putting questions to the witnesses.

INFORMATION on the Revenue side of the Exchequer Division to obtain payment from the defendants of duty under 5 & 6 Vict. c. 79, from which the defendants claimed exemption under 7 & 8 Vict. c. 85.

The information stated the provisions of the Act 5 & 6 Vict. c. 79, imposing a duty on sums received from the carriage of railway passengers. It then stated s. 6 of 7 & 8 Vict. c. 85, obliging every railway company to run daily at least one cheap train complying with the conditions therein mentioned, and s. 9, exempting from tax the fares for the conveyance of passengers carried at fares not exceeding 1*d.* per mile by such cheap trains. It then referred to 21 & 22 Vict. c. 75, further regulating the fares by cheap trains. It then referred to 26 & 27 Vict. c. 33, s. 13, defining what trains should be within the exemption of s. 9 in the first mentioned Act. It then stated that the defendants ran passenger trains at frequent intervals through the day, all of which contained first, second, and third class carriages, and stopped at every station. That the fares did not vary at every station on the line, and in some cases the third class fares were below and in some above the parliamentary rate. That the defendants, in addition to the third class tickets issued by them, also issued tickets which they called third class parliamentary

tickets at the parliamentary rate, but that they only issued at each station two parliamentary tickets for each station on the line by any one train. That such two parliamentary tickets were issued for those stations to which the ordinary third class fare exceeded the parliamentary rate, and that the defendants refused to issue from any one station for any one train more than two tickets at the parliamentary rate for those stations to which the ordinary third class fare exceeded the parliamentary rate. That the company claimed exemption from duty for all fares charged for third class tickets issued by them where the fare did not exceed the parliamentary rate, on the ground that these trains were cheap trains within the meaning of the exemption. That the defendants also alleged that they ran workmen's trains at a penny fare for the entire journey, and claimed exemption from duty in respect of such fares. The information alleged that tickets by these trains were issued to workmen only. That no luggage other than workmen's tools was allowed, and that the Board of Trade had not dispensed with the conditions as to luggage contained in 7 & 8 Vict. c. 85. The information claimed duty on all the fares received from passengers on the defendants' line.

The answer of the company to the original information contained the following statements:—

4. "The defendant company do refuse to issue from any one station for any one train more than two tickets at the parliamentary rate for every one of those stations to which the ordinary third class fare exceeds the parliamentary rate. After two tickets at the parliamentary rate have been issued, for instance, at the Temple for Westminster Bridge by any one train, no more parliamentary tickets would be or are issued at the Temple for Westminster Bridge for that train, but it is not the fact that not more than two passengers could travel by that train at the parliamentary rate from the Temple to Westminster Bridge, inasmuch as all passengers who had obtained parliamentary tickets previously on the same day, whether at Temple station or at Blackfriars, or at Mansion House, or all of them, to all or any of the other stations of the defendant company's railway, could and can travel by that train.

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5. "The practice of the defendant company with respect to the issue of parliamentary tickets is as follows: There is not any restriction by which only two parliamentary tickets can be issued at any one station for each train. By each train throughout the whole day two parliamentary tickets are issued to each other station on the defendant company's railway." The defendants then proceeded to shew at length that the total number of parliamentary tickets which could thus be issued for each train was 128, the total third class accommodation in each train being 178. That they issued parliamentary tickets for 430 trains each day, and that the total number of passengers who could travel by parliamentary tickets in the course of a day was 94,366, exclusive of passengers by workmen's trains.

6. "By means of the arrangement and practice hereinbefore set forth, accommodation is provided for the holders of parliamentary tickets by every train all through the day to the extent of about two-thirds of the third class capacity of the train."

7. That the company moreover ran workmen's trains at 1*d.* fare for the whole journey, such trains conveying on an average 4255 per day.

8. "Unless the limit hereinbefore appearing were placed by the defendant company on the issue of parliamentary tickets, the trains at certain hours of the day would be completely occupied by parliamentary passengers, to the exclusion of every other class of the public.

9. "The defendants submit that, as hereinbefore appears, the defendant company do provide, and have at all times material to this information always provided, on every such day except Christmas Day and Good Friday, in all reasonable and necessary ways for the conveyance of third class passengers in accordance with the obligations of the Cheap Trains Act."

10. The company claimed exemption from duty on all third class fares not exceeding the parliamentary rate, on the ground that all their trains were cheap trains within the meaning of the Act.

17. That the defendants in rendering their accounts had charged themselves with and paid passenger duty in respect of all fares above the parliamentary fares.

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The answer to the amended information contained the following statements:—

1. "The subjoined table sets forth the number of parliamentary tickets which have in fact been issued by the defendant company for each month since the 4th of February, 1876, to the end of June, 1878, and also the number of other passengers carried for each month within the same period."

2. The company referred to paragraphs 4 and 5 of their former answer, and submitted that their trains were cheap trains, because they stopped at each station and conveyed passengers to and from every station at fares not exceeding the parliamentary rate, and in other respects complied with such of the conditions of the Cheap Trains Act as had not been dispensed with by the Board of Trade.

3. "It is not the fact that tickets for workmen's trains are issued to workmen only, but to the public generally desiring to go by such trains, and there is no restriction as to the luggage which parties travelling in workmen's trains are allowed to carry."

The defendants, after issue had been joined, took out a summons for an order that the evidence as to the facts alleged in the above paragraphs of their answers should be taken vivâ voce at the hearing. (1) The application was heard by Lindley, J., at

(1) Rules of Court of the 14th of March, 1866.

Rule X. 2. "The informant or any defendant may at any time after issue has been joined in a cause, apply to a judge by a summons to be served on the opposite party for an order that the evidence as to any facts or issues (such facts and issues to be distinctly and concisely specified in the summons) may be taken vivâ voce at the hearing of the cause, and the judge may, if he shall so think fit, make an order that the evidence as to such facts and issues, or any of them, shall be taken vivâ voce at the hearing accordingly, and the facts and issues as to which any such order shall direct that the evidence shall be taken vivâ voce at the hearing shall be distinctly and concisely specified in such order. And where any such order shall have been made the examination in chief, as well as the cross-examination and re-examination shall be taken before the Court at the hearing as to the facts and issues specified in such order, and no affidavit shall be admissible at the hearing in respect of any fact or issue which shall be included in any such order as aforesaid.

3. "Except as to facts or issues included in any order directing evidence to be taken vivâ voce at the hearing under the first clause of this rule each party shall be at liberty to verify his case by affidavit."

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chambers and refused. The defendants appealed to the Divisional Court.

Dec. 4, 1879. *E. Clarke*, for the defendants. There will be no dispute as to the number of tickets issued, such a matter as that could well be proved by affidavit, but the defendants are anxious that the officials of their line should be in a position when the question is discussed to give evidence as to the practical effect of the company's regulations.

W. W. Karslake, for the Crown. This is the first application ever made to take evidence vivâ voce under this rule. There cannot be any such dispute about facts as to make oral evidence necessary. The questions will turn upon inferences to be drawn from a mass of figures which can be much better considered if they are put down by an affidavit in black and white, so that they can be examined by the parties before the hearing. The intention of the rules was to follow the practice of the Court of Chancery of that day, as being well suited to the class of cases which came before the Court in these informations, and some reason ought to be shewn for taking the case out of the general rule.

E. Clarke, in reply. The defendants are ready to give any information as to the statistics of the company that may be required before the trial, and have no wish to take the informant by surprise as to figures, but it is most important that they should be able to shew by the evidence of their officials what is the effect of the system adopted. It is hardly possible to frame affidavits so comprehensive as to meet every case which might be suggested by the argument on behalf of the Crown.

KELLY, C.B. I cannot think that this order of the learned judge ought to be interfered with. If there were any species of evidence upon which there could be so much difference of opinion as to the inferences to be drawn from it as to involve questions depending upon the merits of the case, it really might be different, but I do not see why anything that a witness, called on behalf of the defendants, could depose to as to inferences to be drawn from certain facts and certain practices of the company cannot be put upon affidavit, just as well as in the shape of oral evidence at the trial. I think it would be imposing upon the judge who

tries the cause a multiplicity of figures and a multiplicity of statements as to the inferences to be drawn from those figures, which there would be no checking, and no limiting of any argument on the one side or the other side, as to what the figures were. What the practice of the railway company is with respect to numbers of passengers, or what the fact is with respect to the numbers of passengers of one class and one description and another, could be just as well put on affidavit as elicited by vivâ voce examination. I think it would be unduly lengthening the cause and creating difficulties in the cause, and as the whole matter, the affidavits and the answers to affidavits, if prepared, if it were in black and white, would be entirely sufficient, I think the order ought to stand.

STEPHEN, J. I will say no more upon this matter than that I do not see my way to interfere with the discretion exercised by the learned judge.

The defendants appealed.

Jan. 28, 1880. *Bray*, for the defendants, was stopped.

W. W. Karslake, for the Crown. The practice on the Revenue side of the Exchequer Division being saved by the Judicature Act the case is to be decided according to the practice established in that division.

[JESSEL, M.R. That practice has not been abolished, but it must be worked with reference to the principle established by the Judicature Act, that oral evidence is to be had where there is no special reason to the contrary.]

The statistics are best given by affidavits, and there is no such dispute of fact as to make it necessary or desirable to have oral evidence. The case is one where the Court of Appeal will not interfere with the discretion of the Court below: *Shrubsole* v. *Schneider*. (1)

JESSEL, M.R. The question raised on this appeal involves to a certain extent the construction of the rules which still govern

(1) 4 De G. J. & S. 52.

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the practice of the Exchequer Division as regards Revenue causes. The third rule of the Chancery Orders of the 5th of February, 1861, which was adopted by the Exchequer rules of 1866, and of course is now binding on the Exchequer Division, is in part as follows: [His Lordship read Rule X. 2 of the Exchequer rules.] It must be remembered that at the time when this order was made the practice in the Court of Chancery and on the Equity side of the Court of Exchequer was not to take evidence vivâ voce, unless in certain exceptional cases. There was therefore a very good reason then, for making a special order to enable the Court to take evidence in that way. But since the passing of the Judicature Act the High Court can always take evidence vivâ voce, and not only can it always do so but, looking at the rules which are part of the Act of 1875, it clearly was the intention of the legislature that the evidence in every case of really disputed facts should be taken orally, unless the parties consented to its being taken otherwise, or there were exceptional circumstances. The state of things which gave rise to this order has therefore passed away, and instead of its being necessary to shew a special reason for departing from the old Chancery practice, it now lies upon the party desiring to proceed according to that practice to shew a special reason for departing from the present general practice. In other words the prevailing theory as to the way in which contested questions of facts should be tried is altogether changed, and I think we ought to have regard to that change in the spirit of legislation in deciding how to exercise a discretion under this order. It appears to me that, having regard to the present state of the law with regard to evidence, the judge should in every case of contested or disputed fact coming on to be tried take the evidence orally, unless some good reason to the contrary is shewn.

In this case I am bound to add that even under the old practice I should have ordered the evidence to be taken orally. It is true that there is no great dispute about the facts, because they must be known to the officials of the company, and they cannot be known to the informant, still there is some dispute; but the main reason why I should come to the conclusion that in this particular case the evidence ought to be taken orally is this, that

the case relates to the practice of a railway company. Now when officials give evidence as to that practice it constantly happens (I speak from my own personal experience in this matter, for I have tried several such cases) that the judge himself wishes to ask questions and to obtain explanations. These can be got readily when the witness is in the box, he can make that clear which an affidavit often leaves ambiguous, sometimes by accident and sometimes purposely. Not only is there great difficulty in ascertaining the truth when the witness is not present, but when, after a discussion has taken place before the judge, a further affidavit is required, there is some danger of the evidence being made to fit the circumstances, so as to be most advantageous for the party giving it, which cannot happen when the questions are asked of witnesses in the box. It appears to me, therefore, that in addition to the application of the general principle there are in this case special circumstances which make it, speaking with the greatest respect to the Court below, eminently desirable that the evidence should be taken orally, therefore I think the appeal ought to be allowed.

BAGGALLAY, L.J. If I had felt satisfied that a discretion had been exercised by the learned judge with reference to all the peculiar circumstances of the case, I should have felt considerable hesitation in reviewing or dissenting from a discretion so exercised. It is stated, however, that Lindley, J., in dismissing the summons, went upon the ground that the evidence was to be taken by affidavit, unless some special case was made by the party applying that it should be taken orally; he therefore proceeded, not altogether in the exercise of a discretion applicable to the particular circumstances of the case, but upon a principle in which I cannot altogether concur. I do not go so far as to say that in a contested case, where one party desires the evidence to be taken orally, and the other side desires it to be taken by affidavit, the evidence ought primâ facie to be taken orally. I think that both views of the case should be present to the mind of the judge, and that he should decide between the one mode and the other, having regard to all the circumstances.

Having regard to all the circumstances of this case, I entertain

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a very decided opinion that there would be a great advantage in having the evidence taken orally, and, amongst others, for the reason mentioned by the Master of the Rolls, that in the course of a trial of this kind, when you have witnesses who in a sense are experts, for they are speaking as to the practice of a particular company, it is a great advantage to the judge, and through him to the suitors, that he should have an opportunity of obtaining information with regard to various matters, which information he can readily obtain when the witnesses are before him, but which he cannot obtain when their evidence is taken upon affidavit.

COTTON, L.J. I am very unwilling, in the Court of Appeal, to interfere with an order made by the Court below in the exercise of a discretion given to that Court; but if the Court below has proceeded on a wrong principle, it is the duty of the Court of Appeal to interfere. Here, as I understand, the Exchequer Division decided the case on the ground that under the rules the evidence was to be by affidavit, except where from the nature of the issues joined between the parties the matter was so far in conflict that the Court could not decide where the truth lay, unless it had the witnesses before it and could judge of their evidence by hearing and seeing them. In my opinion that is not a correct view of the rules. Affidavit evidence should primâ facie be given in all those cases where there is no real conflict of fact, and where no explanation of facts is necessary in order to enable the Court to come to a decision: that is to say, where, though the parties do not admit the facts alleged on the one side or on the other, and it is therefore necessary that the Court should have the statements verified by something beyond the mere allegation of the parties, there is no conflict of evidence. But, in my opinion, evidence should be taken orally in other cases besides those to which the Judges of the Exchequer Division refer, and in such a case as this, where it is desirable to have not only mere verification of statements, but explanation, so as to enable the Court properly to understand what it is on which either party relies, the evidence should, in my opinion, be given orally; because then you can test and examine what the witness means by asking him questions, and this you cannot do if his

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evidence is put into an affidavit settled by his solicitor or counsel, and comes out, not as the statement of the witness of what he knows and what he desires to express as the fact, but as the view which his solicitor or counsel takes of those statements which are made to him. In the present case I should have thought that the Attorney General would have desired that the evidence should be vivâ voce, in order that he might have an opportunity of testing what was said by the witnesses after having heard the exact words used, and in order that he might, if necessary, have an opportunity of getting a proper explanation as to what those words were and a proper explanation of what the witnesses stated.

As regards the question before the Court, in my opinion, we are justified in interfering, in consequence of the Court below having proceeded on a wrong principle, and I think it a case where it is proper that the evidence should be given, not by affidavit, but orally.

Judgment reversed.

Solicitors for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Baxters & Co.*

[IN THE COURT OF APPEAL.]

Feb. 18, 25.

THE ALINA.
BROWN *v.* THE ALINA.

Admiralty Jurisdiction of County Courts—Breach of Charterparty—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2.

The 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869, gives the county courts jurisdiction in cases of claims arising out of charter-parties or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases.

Cargo ex Argos (Law Rep. 5 P. C. 134) followed.

Simpson v. *Blues* (Law Rep. 7 C. P. 290) and *Gunnestad v. Price* (Law Rep. 10 Ex. 65) disapproved.

THIS was an appeal from an order of the Divisional Court consisting of Kelly, C.B., and Stephen, J., granting a writ of

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prohibition to the judge of the county court of Yarmouth against further proceedings in an action against the Russian ship *Alina*.

The action in the county court was commenced on the 28th of October, 1879, by H. Brown & Co. against the *Alina* for breach of a charterparty signed by the master of the *Alina*, by which the ship was to proceed to Cronstadt, there load a cargo of timber, and proceed to a port in England and deliver the cargo for freight. The plaintiffs alleged that the vessel proceeded to Cronstadt, but the master refused to take on board the cargo provided by the plaintiffs, who were consequently obliged to charter another ship; and they laid their damages at 300*l*.

An appearance was entered on behalf of the master. The ship was arrested on the 1st of November, 1879, and still remained under arrest.

The defendant applied to Denman, J., in chambers for a writ of prohibition to restrain the county court from proceeding in the action, and his lordship granted the writ. The plaintiffs then appealed to a Divisional Court of the Court of Exchequer.

The case was heard before Kelly, C.B., and Stephen, J., on the 20th of December, 1879, and the Court affirmed the decision of Denman, J.

The plaintiffs appealed from this decision to the Court of Appeal.

Cohen, Q.C., and *Aspinall*, for the plaintiffs. The question turns entirely upon the construction of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2. The 3rd section of 31 & 32 Vict. c. 71, gives jurisdiction to the county courts in certain matters, in the Act referred to as Admiralty causes, namely, claims for salvage, towage, necessaries, wages, damage to cargo, and damage from collision, where the claim does not exceed a certain amount. In the 26th section a power of appeal is reserved to the Court of Admiralty, and by the 6th section the Court of Admiralty may on motion by any party to an Admiralty cause pending in a county court transfer the cause to the Court of Admiralty. Then, by the 2nd section of 32 & 33 Vict. c. 51, the jurisdiction of the

county courts was enlarged, and it was enacted that the county courts should have jurisdiction to try causes, "As to any claim arising out of an agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also any claim in tort in respect of goods carried in any ship provided the amount does not exceed 300*l.*" This section enlarged the Admiralty jurisdiction of the county courts, so that they are now able to entertain causes arising out of breach of charterparties, although such causes are not within the class of Admiralty causes referred to in the Act of 1868, and are not originally cognizable by the High Court of Admiralty. There have been conflicting decisions upon this question. In *Simpson* v. *Blues* (1) the Court of Common Pleas held that the latter Act was not to be construed so as to confer jurisdiction on the county courts in causes other than "Admiralty causes" within the definition of the Act of 1868, and that decision was followed in *Gunnestad* v. *Price.* (2) But in *The Cargo ex Argos* (3) the Privy Council held that the words of the Act of 1869 were unambiguous, and gave jurisdiction to the county courts in causes arising out of charterparties, even though the Admiralty Court had no original jurisdiction in them. This decision is in accordance with the true construction of the Act. There is nothing ambiguous in the words of the section, nor does this interpretation of it lead to any absurd result. There is nothing absurd in supposing that the legislature intended to give the county court jurisdiction over a larger class of cases, accompanied as it is by the power of proceedings in rem, than are enjoyed by the Admiralty Court, provided the matters in dispute are of small amount. Jurisdiction in matters arising out of charterparties was originally claimed and exercised by the Admiralty Court, although that exercise was so constantly resisted by the Common Law Courts that by degrees it was abandoned; Abbott on Shipping, p. 116; *De Lovio* v. *Boit* (4); *The Volunteer* (5); Kent's Commentaries, vol. 1, p. 368; Parson's Law of Shipping, vol. 2, p. 174. There is nothing unreasonable in its being now partially restored.

(1) Law Rep. 7 C. P. 290.
(2) Law Rep. 10 Ex. 55.
(3) Law Rep. 5 P. C. 134.
(4) 2 Gallison (Amer.) 398.
(5) 1 Sumner (Amer.) 551.

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Herschell, Q.C., and *Wood Hill*, for the respondent. The reasoning in the judgments in *Simpson* v. *Blues* (1) and *Gunnestad* v. *Price* (2) is conclusive. The construction contended for by the plaintiffs would lead to strange anomalies, namely, that the inferior Court would have a wider jurisdiction than the superior Court to which an appeal lies, that the Appellate Court would have an appellate jurisdiction where it has no original jurisdiction, and that it would be able to acquire a jurisdiction in cases in which it had no original jurisdiction by transferring causes from the county court. It is also unreasonable to suppose that the legislature intended to give to the county court the power of arresting the ship, which follows upon the admiralty jurisdiction, and on the other hand to deprive the parties of the benefit of a jury, without express words to that effect. The words of the Act of 1869 are in themselves ambiguous, for the expression "in relation to the use or hire of a ship" are so wide that they must have some kind of qualification, and the true interpretation must be sought by reading the two Acts together, and finding from them the intention of the legislature. The reasonable qualification is that the claim must arise in any cause now cognizable by the Court of Admiralty: *The St. Cloud.* (3)

JESSEL, M.R. The question which we have to decide cannot be treated as an easy one, inasmuch as it has given rise to such a conflict of decisions; but when we apply to this clause in the Act of Parliament the well-established rules of construction, I must say, speaking for myself alone, that it does not appear to me to be so very difficult a question as to have necessarily caused so much conflict of opinion. The rule of construction, as laid down in all the cases, and notably in the House of Lords, is this, that where you have plain terms used in the enacting part of an Act of Parliament, nothing less than manifest absurdity will enable a Court to say that the ordinary and natural meaning of the terms is not the true meaning. Where there are two or more readings possible, that is, where there is ambiguity, there of course you let in arguments of much less strength; in such cases arguments as to

(1) Law Rep. 7 C. P. 290. (2) Law Rep. 10 Ex. 65.
(3) Bro. & Lush, 4.

inconvenience, and arguments as to the more useful or more likely interpretation, may be fairly considered. Therefore it appears to me that we must first determine whether the words are in themselves unambiguous, and if we arrive at that conclusion, then whether there is any such manifest absurdity as will enable a Court of construction to say that the natural meaning of the words could not possibly be the meaning intended by the legislature to be put upon them.

Now, first of all as to the words themselves. The Act is called "An Act to amend the County Courts Admiralty Jurisdiction Act, 1868, and to give jurisdiction in certain maritime causes." If you judge by the title, it certainly extends to giving fresh jurisdiction in certain maritime causes. The 2nd section is as follows: "Any county court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*." I am at a loss to see any ambiguity in those words. An agreement in relation to the use or hire of a ship must include a charterparty. It would be difficult to define a charterparty otherwise than as coming within those terms. In fact, it is very often so defined. I see no doubt or difficulty, as far as I am concerned, in reading the words in their proper sense and they do appear to me to be quite clear. I am very glad on this point at all events to see that, with one exception, the judgments of all the judges who have given an opinion or decision upon this section are unanimous, though the exception is one of great weight and importance.

In the case of *Simpson* v. *Blues* (1), where there were four judges, Justices Willes, Byles, Brett, and Grove, no one alleged, although something of that kind had fallen from Justice Willes on a previous occasion, that the words were anything but clear in themselves, and the ground of the decision was totally different. In the case in the Privy Council again, *The Cargo ex Argos* (2),

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we have four judges present, being the four ordinary judges of the Privy Council, and all four agreed that the words were clear. Then when the case came again before a common law court, in *Gunnestad* v. *Price* (1), there were only two judges present, Baron Cleasby and Baron Bramwell. Baron Cleasby does not state the words to be otherwise than clear in themselves, but I admit that Baron Bramwell does, and he says that he considers them ambiguous. Now, therefore, we have only one judge who considers them ambiguous. Whether or not they are ambiguous is a question of course not to be lightly passed over with the opinion of Baron Bramwell the other way, and therefore I wish to say a word or two on the grounds which induced him to think them ambiguous.

He says this: "The words are 'claim arising out of any agreement in reference to the use or hire of any ship,' not 'claim arising out of any agreement for the use or hire of any ship.' I cannot think that the enactment is in plain and intelligible language free from ambiguity. If I found the words without anything to control them or guide me in their interpretation I should say they included the cases before us and much more. But as it is, I declare I do not know what they mean or were intended to mean. A charterparty is not an agreement for the use or hire of a ship, but it is said to be included in the words 'claim arising out of any agreement made with reference to the use or hire of any ship.' Would that include a shipbroker's claim for finding a charter?" Then he says: "Take the next words, 'Claim arising out of any agreement in relation to the carriage of goods in any ship,' does that include a claim on a policy of insurance? Some restriction must be put upon the words." Now it appears to me first of all that there is some slip about the charterparty. A charterparty certainly is an agreement for the use or hire of a ship, and consequently the ambiguity which the learned Baron is there speaking of is one of his own creating. He does not doubt for a moment that a charterparty would be included under the terms; what he doubts is whether something else not before him would be included under the terms. Therefore there was no ambiguity

(1) Law Rep. 10 Ex. 65.

as regards the case then to be decided; the words did include it. The supposed ambiguity relates to something totally different—a shipbroker's claim for finding a charter or a claim on a policy of insurance. It will be time enough, therefore, to consider whether or not those things are included in the words when the case arises. But when you come really to examine Baron Bramwell's opinion, he does not dispute that the words will include a charterparty, subject to the correction which I have ventured to make in his definition of the term charterparty. So that one may consider substantially that all the judges are agreed that the words are clear.

Well, now, if the words are clear are there other words in the Act of Parliament to shew that they have a different meaning? That is not suggested, but what is suggested is that by reason of the literal interpretation of the 3rd section great inconvenience will follow, great alteration of the law will be made, and that those inconveniences are such as should induce the Court to control the plain meaning of the words.

Now, unless those inconveniences amount to manifest absurdity, it appears to me the law does not allow any such control to be exercised over the plain words of an enactment by a Court of construction, and consequently that the judgments given by the Court of Common Pleas, and with one exception again the judgments given by the Court of Exchequer, could not be supported in point of law, because all that was relied upon was inconvenience. But I again admit that there is the exception in the case of Baron Bramwell. He does put it on what appears to me a true legal ground, manifest absurdity—and it only remains for me to consider whether there is any such manifest absurdity. That I am not misinterpreting the reasons given in the judgment in the Common Pleas is plain, I think, from a very few words of the judgment itself. I nowhere find in the elaborate judgment delivered by Mr. Justice Brett anything like the word "absurdity," or words equivalent to it in any shape or way. What he says at page 296 is this: "These considerations lead, we think, to the conclusion that we ought not so to construe the words of these County Court Acts as to create this large novel and inconvenient jurisdiction, when we find from the context that the

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general intention was only to distribute the Admiralty jurisdiction by allowing suits of limited amount to be instituted in inferior Courts." And when we look in detail into his reasons, his reasons are these. First he says: "The Admiralty Court is the Court of Appeal, and it has no jurisdiction to entertain these causes in the first instance." Now to my mind that is not a good reason either on the ground of inconvenience or otherwise. It has frequently happened that the Court of Appeal has no original jurisdiction, and it has not unfrequently happened that even when the Court of Appeal has an original jurisdiction of its own, it has no original jurisdiction in respect of the matters as to which the appeal is given, nor is there in that respect any argument from inconvenience, because the Court of Appeal may be a very good Court of Appeal and not a good Court of original jurisdiction.

Then the next ground is this, that there is a power of transfer in different cases from the county court to the Admiralty Court. Well I will assume for this purpose that the power of transfer applies to these particular cases. Then it is said that the result will be to give to the then Admiralty Court, at its will and pleasure, a new jurisdiction, which it did not possess at the time the Act passed. I am not very much impressed by that argument. In the first place, it is not to be presumed that the Admiralty Court will transfer causes, except in the case in which the legislature intended the causes to be transferred—cases of such peculiar difficulty that they ought to tried in the first instance by the Admiralty Court, and, therefore, there will be no arrogation of jurisdiction, except where it was conferred by the legislature. Then it is said, why confer that jurisdiction on the Admiralty Court? I do not know that there is any objection to it. When the Act was passed the Admiralty Court took evidence, and conducted its proceedings very much in the same way as the common law courts. There might be some trifling differences, but substantially justice was administered very much in the same way. What inconvenience would arise by giving this jurisdiction to the Admiralty Court? The only suggestion we have heard is that the plaintiff might not get a jury or the defendant might not; but the answer was very simple. It does not follow that that was considered

an evil by the legislature. We know perfectly well that by the comparatively recent Judicature Act, that very option is given to a plaintiff of going to a Division where there is no jury, instead of to a Division where there is a jury.

Therefore, I cannot see that there is any strong argument to be adduced from the legislature having done that partially only which it has since done to a very great extent.

Those are two objections. The third objection is this, that looking at the 3rd section of the Amendment Act, the jurisdiction is conferred on the county court to proceed in rem, thereby enabling the county court to arrest a ship in cases where, before the passing of the Act, the ship could not be arrested. Well, there again I am at a loss to see the inconvenience. It might have been considered by the legislature to be of very great importance that in these cases you should have the power to arrest a ship. Inconsistency there is, and that is really a part of the argument. It is inconsistent that the county court can arrest the ship where the claim is for the smaller amount, and the Admiralty Court or the common law court cannot arrest a ship where the claim is for the larger amount; yet, although it is in one sense an inconsistency, in another sense it is not. It may be the view of the legislature that additional remedies are to be given in cases of claims for small amounts, or of a peculiar character relating to ships, which are not given in cases of larger amounts or of an ordinary character not relating to ships. The remedy to the seamen for their wages, for instance, is different from the remedy of domestic servants for their wages, and it does not at all follow that all that was not contemplated by the legislature, and I again am at a loss to see the great inconvenience.

Well, then, it was said that charterers and shipowners of smaller vessels would be at a disadvantage, because their ships would be liable to arrest. Of course, one answer would be, that if the amounts claimed were small the amount of bail would be small, and the inconvenience, therefore, as far as they are concerned, would not be the subject of very grave consideration.

I have gone through all these reasons, because it does not appear to me that the case is made out even as to great inconvenience, but I am also of opinion that even if it were made out

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it would not be sufficient to enable us to control the plain words of the Act of Parliament.

Now, in *Gunnestad* v. *Price* (1) Baron Cleasby does not really take any new ground which had not been already considered; but Baron Bramwell does, he says: "Shortly, the objections are, that on the construction contended for by the defendants the county court has Admiralty jurisdiction in cases in which the Admiralty Court has no original jurisdiction;" that I have dealt with—"that the High Court would have an appellate jurisdiction where it has not an original jurisdiction;" that I have dealt with; "that there could be transferred to it from the county court causes which it could not originally entertain, and so it could hear and decide cases not properly within its own jurisdiction or that of the county court." That, I have dealt with. "To these objections are to be added, not as aiding the construction of the statute, but helping to the probable intention of the legislature, the objections so forcibly stated in the judgment of the Common Pleas, to the Admiralty procedure being applied to such cases as those in question." Therefore, according to Baron Bramwell, those last objections are not sufficient—with which I cordially concur. We have only got the remaining three, therefore, and what does he say is the effect of the three. He says as to the limited construction, that is, confining it to Admiralty causes, "With great respect it seems to me a meaning may be given to the words without the admittedly preposterous consequences the defendants contend for;" and he says further, "This construction gives a meaning to the words without the absurd consequences which would follow on the defendants' construction." Consequently, he alone comes to the conclusion that those three consequences I have mentioned are so preposterous and so manifestly absurd that they could not have been in the intention of the legislature.

Now, with the greatest possible respect for Lord Justice Bramwell, and no one entertains a greater respect for him than I do, it shews how these different consequences strike different minds. Not only do they not appear to me to be either absurd or preposterous, but I cannot see any objection to them at all, I cannot see any objection on the ground that the Appeal Court has no original

(1) Law Rep. 10 Ex. 65, at p. 73.

jurisdiction over the same subject-matter. I cannot see any objection on the ground that the county court should have Admiralty jurisdiction where the Court of Admiralty has no jurisdiction, nor can I see any objection on the ground, which is the third and only one remaining, that the Court of Admiralty should transfer to itself especially difficult causes relating to maritime matters, though the Court itself had no original jurisdiction to deal with such a cause.

That being my opinion, it appears to me there is no absurdity and nothing preposterous in these consequences to induce us to overrule or control the plain meaning of the Act of Parliament. It does therefore lead me to the conclusion that the decision of the Privy Council is the correct decision, and consequently that we should allow this appeal.

JAMES, L.J. It appears to me that everything that could be said has been said in the judgments we have heard read with the addition made by the Master of the Rolls. All I can say is that having considered everything, I do most entirely adopt the language of the judgment of the Privy Council, as it seems to me disposing of almost the whole of the case.

The only thing that I shall say in addition to that is that it does appear to me that if you construe this last Act, which is the Act before us, irrespective of the 3rd section, merely considering it as a question of ordinary jurisdiction to be exercised by the county court, there could not have been, as it seems to me, the shadow of a doubt as to the meaning of the 1st and 2nd sections; that is to say, supposing there had not been the 3rd section giving the power of proceeding in rem, it would have been the merest matter of course to have held that the county court had the ordinary power of a county court to deal with the claims in question in its ordinary jurisdiction. Well, if that was so—if that was the meaning of the Act of Parliament irrespective of that 3rd section, is it inconsistent with the ordinary rules of construction of an Act of Parliament to say that a clause saying in so many words "In all the cases aforesaid the Court shall have jurisdiction in rem" is to be held to take away the jurisdiction in cases which it had in the plainest terms given it? Is it not, on the

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contrary, as if in order to remove all doubt the legislature had said, "Though you may think we could not have meant it we do in so many words say that in every one of these cases the county court shall have jurisdiction in rem." It is said that because they say in those cases the Court shall have jurisdiction in rem, that is to cut down the cases in which jurisdiction is given. If it had been intended to have said merely that the county court shall have the jurisdiction of the Court of Admiralty, in those particular cases it appears to me it would have said so in so many words; that is to say, the Act being an Act to amend a former Act and to give jurisdiction in certain maritime cases, the first section would have said that the Court should have such jurisdiction as the Court of Admiralty possesses in the following matters, and then the whole thing would have been made quite clear. It seems to me that the legislature intentionally did not do so, but gave jurisdiction in certain matters, and then went on to give the particular remedy of the Court of Admiralty in all the cases in which it had so given jurisdiction.

I only add these few words to what I have said before, namely, that I adopt as my judgment from the beginning to the end, the judgment of the Privy Council.

COTTON, L.J. If there had not been such a difference between the different judges and different Courts before whom this question has come, probably I should have contented myself by saying, that, in my opinion, the judgment of the Privy Council in the case referred to exhausts the matter, and is the correct decision, but I think it not right so to leave the case. What we have to consider in this case as the primary question, is, whether or no the 1st sub-section of the 2nd section of the Act of 1869, does or does not clearly include the action which has been commenced in the county court. The words seem simple enough, "that the county court shall have power and authority to try and determine the following causes: As to any claim arising out of any agreement made in relation to the use or hire of any ship." We must consider whether there is any ambiguity in those words, without reference to the question what will be the consequence of holding that they do or do not include a particular cause of action. It has

been said, that a charterparty is not a contract for the use or hire of a ship. In some cases the person who enters into the charterparty becomes, for the time being, the lessee of the ship. But it is quite sufficient to refer to the well recognized authority of "Abbott on Shipping," for the purpose of shewing that those words do aptly refer to and include a charterparty. Because what the learned author says is this (1): "A trading ship is employed by virtue of two distinct species of contract, first, the contract by which an entire ship, or at least the principal part thereof, is let for a determined voyage to one or more places. This is usually done by a written instrument called a charterparty." So that he does refer to it as a contract for the letting of a ship, and no one can for a moment say that when it applies to the whole of the ship it is not a contract for the use of a ship, or where it does not apply to the whole of the ship it is not a contract for the use of a part of a ship. That being so, here are words which, as regards the particular section with which we have to deal, have in themselves no ambiguity at all, and do aptly refer to an action arising in respect of a claim on a charterparty.

But then it is sought to restrict this by saying that it means any claim in which the Court of Admiralty has jurisdiction. I asked Mr. Herschell whether he could point out any claim arising on a charterparty in which the Court of Admiralty had jurisdiction? He said, No, except a matter which would come within the second part of this clause, "or an agreement in relation to the carriage of goods in any ship." So that practically, the argument comes to this, that we must disregard and give no effect whatever to the first words of this sub-section. In my opinion no sufficient reason has been given to justify us in disregarding these words or declining to give them their natural meaning. After what has been already said, I will refer to two only of the points pressed upon us. It has been said that this comes within an Act which transfers to the county courts Admiralty jurisdiction, and therefore we ought to restrict the power given by this section to powers which the Court of Admiralty has. We must consider here how and when this power was given. It was not given in the

(1) 11th ed. p. 100.

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original Act, and although this subsequent Act is an Act which is to be read as part of the first Act, yet it is in fact a subsequent Act giving additional power to the county courts. This gets rid of a great deal of the argument adduced by the respondents. Parliament had given by the first Act, some part of the Admiralty jurisdiction to the county court, and here it does not in terms say it gives such jurisdiction in this matter as the Court of Admiralty had, but having given to the county court certain Admiralty jurisdiction, with a power to transfer cases to the Court of Admiralty, and with power to appeal to the Court of Admiralty, it thinks fit to give the county court this additional power, not altering the power of appeal or the power of transfer. It only comes to this that parliament, having given certain Admiralty jurisdiction to the county court and giving it this additional power in matters or contracts relating to the use or hire of ships, still left a power of transfer to the Court of Admiralty and still left the appeal to the Court of Admiralty. Therefore assuming for the purpose of my judgment, that, as regards this particular cause of action there would be a power of transfer to the Admiralty Court, and that there is in cases like this, an appeal to the Admiralty Court—although it must not be considered that I express an opinion that it is so, that question not being now before us—but taking the argument as in favour of the prohibition most strongly, and assuming that there would be such a power of transfer and of appeal to the Court of Admiralty, the supposed difficulty, when the terms and circumstances under which the Act was passed are considered, does not in my opinion justify us in declining to give effect to the words of the later Act.

The only other point which I mention is this, that, according to our decision, there will be a lien practically on the ship in respect of a similar claim of a limited amount when there is no such right in respect of similar claims of a greater amount; but it only comes to this that parliament has thought fit to pass an Act which, according to its true construction, does give that right; and if that is so, is it the duty of this Court to cut down the enactment, because the Act has done something which may be thought inconsistent with the law not having being altered as regards claims of

a larger amount? In my opinion, no such considerations ought to induce us to say that effect is not to be given to the clear words of an Act of Parliament.

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JAMES, L.J. It may not be inconvenient to add this with regard to one point. A great deal has been said about the power of transferring to the Court of Admiralty; but when the Court of Admiralty sits as an appeal Court its decision is final; but where the matter is transferred to it, it is transferred subject to an appeal to the High Court of Justice.

Appeal allowed.

Solicitors for plaintiffs: *Coote & Diver, Yarmouth.*
Solicitors for defendants: *T. Cooper & Co.*

WATNEY & CO., APPELLANTS; MUSGRAVE, RESPONDENT.

March 11.

Revenue—Income Tax—Balance of Profits and Gains—Deduction for exhausted Capital—5 & 6 *Vict. c.* 35, *s.* 100, *sch. D.*—29 & 30 *Vict. c.* 36, *s.* 8.

The appellants, a firm of brewers, in order to increase the sale of their beer and so to increase their profits, purchased the leases of public-houses, which they let to tenants, who covenanted to buy of them all the beer to be sold in such houses. The appellants, besides covenanting to pay fixed rents for the terms of years reserved by the leases, were obliged, in some instances, to pay premiums for such leases. They claimed in arriving, for the purpose of the income tax, at the balance of profits and gains of their trade, to be entitled each year to an allowance in respect of a portion of the amount so paid by them as premiums, on the ground that such allowance represented a portion of their capital exhausted during the year in earning profits:—

Held, that the appellants were not entitled to any allowance in respect of the premiums.

CASE stated under the Customs and Inland Revenue Act, 1874 (37 & 38 Vict. c. 16), s. 9, as to income tax assessment under schedule D.

1. The appellants appealed against an assessment made on them under schedule D. of 16 & 17 Vict. c. 34, in respect of the profits of their trade.

2. At the hearing of the appeal, the commissioners made a considerable reduction in the assessment, but they refused to

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allow a further reduction of 4466*l.*, which was claimed by the appellants under the following circumstances.

3. The appellants made their profits in trade by brewing beer and selling it to persons who might think fit to buy it; but, in order to increase their trade, it has for years been their practice to buy the leases for various terms of licensed public-houses and beer-houses, and then to let such houses to tenants who covenant to buy of the appellants all the beer to be sold in such houses.

4. In order to obtain such leases the appellants are obliged, in many cases, to pay large premiums, and to covenant to pay a fixed rent for a term of years.

5. The profits made by the sale of beer to the tenants are included in the assessment, and the appellants claim that, for the purpose of arriving at the just balance of the profits and gains of their trade, it is necessary each year to make an allowance in respect of a portion of the amount which was paid by them to acquire the leaseholds, and without which they would not have been able to make any profits in respect of the same, and that such allowance represents only the portion of their capital exhausted during the year in earning the profits.

6. The following instance has been stated on the part of the appellants as an example.

7. The appellants recently bought the lease of a public-house for thirty years, for which they paid a premium of 1300*l.*, and covenanted to pay the landlord a rent of 105*l.* a year. Such lease contained the usual covenants for the lessees to repair, &c. The appellants let such public-house to a tenant who under his agreement is bound to buy of the appellants all beer to be sold in the house. (1) Assuming that their gross profit from such sale would amount to 60*l.*, which profit they could not have made unless they had expended the 1300*l.* in purchasing the lease, they claimed that the balance of profits and gains on which they were to be assessed should be less than that sum by 43*l.*, being the portion of the said sum of 1300*l.* which had been exhausted

(1) It was assumed for the purposes of the argument that the rent paid by the tenant was the same as that paid by the appellants, namely 105*l.* per annum.

during the year by reason of one year of the term having run out, namely, one-thirtieth of the said sum of 1300*l.* In the assessment to the income tax the 60*l.* profit from the sale of the beer was included.

8. The sum of 4466*l.* consisted of the aggregate of various sums relating to the leaseholds in which capital of the appellants was invested, as mentioned in paragraphs 4 and 5, and arrived at in the same manner as the sum of 43*l.* mentioned in the last paragraph.

9. But for the expenditure of the capital to pay the premiums, the leaseholds out of which profit is made, as mentioned above, could not have been acquired, nor such profit made, and each year a portion of the premium paid is exhausted.

10. The commissioners were of opinion that the claim to reduce the assessment by 4466*l.* ought not to be allowed.

The question for the opinion of the Court was whether the commissioners were right.

Grantham, Q.C. (*Poland*, with him), for the appellants, contended that as they must sink this sum in order to make the profit on which income tax was charged, they were entitled to make the deduction. He referred to *Knowles* v. *McAdam*. (1)

Sir J. Holker, A.G. (*Dicey*, with him), for the Crown, was not called on.

KELLY, C.B. I am clearly of opinion that the Crown is entitled to the judgment of the Court. In this case it is claimed to deduct, not the costs of production of the article, but expenses incurred and money disbursed to promote and increase the sale of the article after it has been produced. I am not aware of any authority to be found in the statutes or in any decision for deducting such expenses in ascertaining the amount of profit which is to be assessed under the Income Tax Acts. I am not aware that any exceptional qualification has ever been introduced by law or under authority which at all affects the mode in which the profits of the trade of a brewer shall be assessed and taxed. The deductions are confined entirely and exclusively to the costs and expenses

(1) 3 Ex. D. 23.

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incurred in the production of the article. (1) I do not pretend to enumerate what those costs and expenses are, but, amongst other things, one matter was referred to in the course of the argument, namely, the deduction of the rent or a part of the rent of the premises in which the beer is produced. Then there is also the cost of the raw material and the wages of the servants and labourers and other persons employed in the manufacture. Now, for the first time, as far as I am aware, it is sought to include in the sum to be deducted, so as to ascertain the balance which would constitute the net profits of the concern, sums of money expended, not in the manufacture, but after the production of the article in order to promote the sale or increase the quantities sold. Take by way of illustration the case I put in the course of the argument. Many houses, and amongst them no doubt brewers, engaged in manufacturing various articles of trade, after those articles have been prepared, or while they are preparing, with a view to increase the sale, spend large sums of money in advertisements. I am not, however, aware that any attempt has been made hitherto to claim to deduct the costs of advertisements, by means of which the quantity of beer sold in the course of the year may be considerably increased, but which has no reference to, and bears no part at all in, the production of the article. The present case is an instance, not of advertisements, but of expenses incurred to induce a publican or class of publicans to purchase quantities of beer. It may be necessary to take those expenses into consideration in ascertaining the net profits of a commercial firm during any given year

(1) 5 & 6 Vict. c. 35, s. 100, Schedule D, first case: "Duties to be charged in respect of any trade manufacture adventure or concern in the nature of trade not contained in any other schedule of this Act, rule 1. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade manufacture adventure or concern upon a fair and just average of three years . . . . and shall be assessed charged and paid without any other deduction than is hereafter allowed." Rule 3 enumerates a number of things that may *not* be deducted, and by s. 101 deductions are allowed in the case of a person carrying on two trades, who may set loss in one against profit in the other, and a person renting a dwelling-house part of which is used by him for the purposes of any trade or concern or any profession may deduct a sum not exceeding two-thirds of the rent. Section 159 prohibits deductions other than such as are enumerated in the Act.

or time, but inasmuch as it has never been argued or even suggested that such expenses should be taken into consideration, in ascertaining the difference between the cost of production and the money realized during the course of the year by the sale of the beer, for the purposes of the income tax, I do not think we ought to deal with this in the way suggested. It only remains for me to observe that the case cited in the course of the argument was totally different from the present. That was a case of depreciation of the property which had been leased to the parties occurring in the course of the production and by reason of the production of the article itself. It appears to me that the expenses which are sought to be deducted here are of a character and description quite unconnected with the production of the article, and cannot consistently with the statute be deducted.

HAWKINS, J. I am also of opinion that the Crown is entitled to our judgment, as the argument has failed to convince me that there is any ground for allowing the deduction. The assessment is to be made on the profits of trade, and the Act of Parliament prescribes the mode in which the assessment is to be made. It sets forth in the schedules those matters which may or may not be claimed by way of deduction, and I cannot find, either in the Act itself or in the schedules, any ground whatever for saying that an allowance ought to be made in respect of the unremunerative premium paid for the lease of a public-house, which is bought by the brewer for the purpose of increasing his trade by insisting upon his tenant entering into a covenant to purchase all the beer he may require from his landlord's brewery. The house itself, it seems to me, is a matter totally apart from the trade. The trade of a brewer consists in manufacturing beer, and selling it to customers, and when it has got into the customers' hands at a fixed price, the price that is paid for the beer, minus all those charges which are strictly incidental to the production of it, which are clearly matters to be deducted, constitutes the profit which is liable to be assessed. As at present advised, I am far from saying that the cost of conveying the beer to the consumer ought not to be allowed to be deducted as a legitimate trade expense. If the cost of conveying the beer to the customer were not incurred, he

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would be obliged to go to the brewery and fetch his own beer; and it stands to reason that the price paid at the brewery by the customer who at his own expense carried it away, and delivered it at his own house, would be less than the price realized where the brewer himself conveys and delivers it to his customer. In this case I do not find that the house has anything to do either with the manufacture of the beer, the conveyance of it from the brewery, or the price paid by the public for it. The house, it is true, is or may be a valuable adjunct to the brewery, by increasing the number of consumers; but the house, whether it yield a profit or loss to the brewer, is not in the least connected with the trade profit of the brewery. The rent of the house is not taken into consideration by the brewer in considering what are the incomings of the trade, neither are the outgoings of the house to be taken into consideration when we come to consider the outgoings of the trade.

I cannot myself, I confess, see the difference between this case and the illustration I put in the course of the argument. If a man has a piece of ground upon which he is minded to speculate, and build for himself a brewery, and carry on in that the business of a brewer; and if in order to bring custom to his brewery he builds on that ground a couple of hundred houses, imposing upon each tenant the obligation of buying beer from him, and by the sale of the beer he makes a profit, but the tenants do not pay their rents, I cannot see upon what ground the rents in arrear should be charged against the profits of the trade as being expenses incurred in the trade. So here there are two distinct things, the trade of brewer and the public-house, and the expense incurred in respect of the latter cannot be deducted from the profit of the former.

Judgment for the Crown.

Solicitors for appellants: *Pownall, Son, Cross, & Knott.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

THE ATTORNEY GENERAL *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

1880
March 9.

Revenue—Railway Passenger Duty—5 & 6 Vict. c. 79, s. 2—Sum charged as Fare —Sum charged to cover the Government Duty, or for extra Accommodation.

By 5 & 6 Vict. c. 79, a duty at the rate of 5*l.* per cent. is payable upon all sums received or charged for the hire, fare, or conveyance of passengers upon any railway. A local Act fixed the maximum rates to be charged by the defendants "for the conveyance of passengers along the said railway, including the tolls for the use of the railway, and of carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid, except government duty." In order to cover the duty of 5*l.* per cent., the defendants required passengers to pay in addition to the sum, whether maximum or otherwise, nominally charged for fare a further sum of five per cent.:—

Held, that the duty was payable on the entire amount received by the defendants, and not merely on the amount nominally charged for fare.

Semble, that the duty would be so payable, although the amount received exceeded that which the defendants were lawfully entitled to charge.

Quære, whether the company were entitled to add the five per cent. to their fares to cover the government duty.

The defendants provided sleeping saloon carriages available for first-class passengers on payment of a special charge in addition to the ordinary fare, and provided with sleeping accommodation, a lavatory, and other conveniences. When the carriages arrived at their destination they were put into a siding where the passengers could remain until the morning, and a special servant was employed to wait upon them, to call them when they wished, and to bring them hot water when they were called:—

Held, that the accommodation so provided was incidental to the conveyance of passengers, and therefore the extra charge was a fare, on which duty was payable, within the meaning of 5 & 6 Vict. c. 79.

INFORMATION under 5 & 6 Vict. c. 79, s. 4, against the defendants from which and from the answer the following facts appeared:—

By 5 & 6 Vict. c. 79 (the Railway Passengers Duty Act) s. 2, and the schedule to that Act, certain duties are made payable, and among others "for and in respect of all passengers conveyed for hire upon or along any railway, a duty at and after the rate of 5*l.* for 100*l.* upon all sums received or charged for the hire, fare, or conveyance of all such passengers."

The defendants are a railway company incorporated by Act of Parliament, and convey passengers for hire from London to divers parts of Great Britain.

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By s. 63 of a local and personal Act of the defendants (9 & 10 Vict. c. cciv.), it is enacted (inter alia) as follows:—

"That the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the railway, and of carriages, and for locomotive power and every other expense incidental to such conveyance as aforesaid, except government duty, shall not exceed the following sums; that is to say,

"For every passenger conveyed in or by express train the sum of $2\frac{1}{2}d.$ per mile.

"For every passenger conveyed in a first-class carriage the sum of $2d.$ per mile.

"For every passenger conveyed in a second-class carriage the sum of $1\frac{1}{2}d.$ per mile.

"For every passenger conveyed in a third-class carriage by any such other train the sum of $1d.$ per mile."

The maximum rate of fare permitted to be charged by the last-mentioned Act has not in all cases been charged by the defendants in the case of passengers conveyed by first or second-class carriages, but has been charged in nearly every instance in the case of passengers conveyed by third-class carriages.

The defendants require the passengers conveyed by them to pay in addition to the rate of fare, whether maximum or otherwise, a sum of five per cent. thereon to cover the duty of 5*l.* per cent. imposed by the Passengers Duty Act, and they contend that they are not liable to pay duty on the entire amount charged by them to and received from their passengers, but only on the amount charged for fare. The defendants keep an account of the sums so received by them separate from the account of sums charged for the hire, fare, and conveyance of passengers.

The defendants further dispute their liability to pay the duty on certain fares charged by them for the conveyance of certain first-class passengers under the following circumstances.

The defendants run by certain of their night trains special carriages called "sleeping carriages." The defendants provide for each person using such sleeping carriages a couch six and a half to seven feet long, a clean sheet, a rug or blanket, and

a clean pillow case, a lavatory, with water laid on, and soap and towels, a water bottle and glass, and a looking glass, and also a water-closet, &c. When the persons using the sleeping carriages desire to enter them to retire to rest they are not again disturbed during the night. When the sleeping carriage has arrived at its destination it is put into a siding specially reserved for it, where the persons using it can remain until the morning, and a special servant is employed to wait upon them there, to call them when they wish, and to bring them hot water when they are called.

A special independent charge is made by the defendants for providing the aforesaid accommodation, and a special ticket is issued entitling the holder to a berth in the sleeping carriage (if there be room) on production of a first-class railway ticket, covering the journey for which the sleeping carriage is used. No one who has not already paid the first-class fare for his conveyance upon or along the railway for the journey is permitted to use the sleeping carriages.

The defendants contended that the charges made by them for providing the aforesaid accommodation were not sums received or charged for the hire, fare, or conveyance of passengers, but independent charges for what practically amounts to hotel accommodation, and were not liable to the duty imposed by the Railway Passengers Duty Act.

The information claimed a declaration that the defendants were liable to pay duty at the rate of 5*l.* for every 100*l.* for and in respect of all sums received or charged for the hire, fare or conveyance of passengers conveyed for hire by them, and that they were not exempt from duty in respect of the five per cent. received by them from their passengers as aforesaid, nor in respect of the fares charged for the conveyance of passengers in sleeping saloon carriages.

Sir H. Giffard, S.G., and *W. W. Karslake*, for the Crown.
Dugdale (*Darling*, with him), for the defendants.

KELLY, C.B. Every argument applicable to such a case as this has been presented to us, but I have not the slightest doubt

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that upon the true construction of this Act of Parliament the Crown is entitled to the judgment of the Court upon both the points raised.

The first question is, whether the Crown is entitled to charge the duty on the entire sum charged to the passenger, including five per cent. above the charge which he would have to pay, which is added to cover the duty. I am of opinion, without entering into the question whether it is lawful as between the company and the passenger to charge this five per cent., that if the company think fit to add to the amount, suppose it is twopence per mile, which they are entitled to charge, a further amount of five per cent. on the sum, whatever it may amount to over and above the twopence per mile, the Crown is entitled to duty on the entire sum. The provision of the Act of Parliament is that the Crown shall be entitled "for and in respect of all passengers conveyed for hire upon or along any railway a duty at and after the rate of 5*l.* for 100*l.* upon all sums received or charged for the hire, fare, or conveyance of all such passengers." If a passenger, before he is permitted to travel from one place to another, has to pay a sum of money for his transit, it is on tha that the duty of five per cent. is payable. If, therefore, that sum which the passenger has to pay includes five per cent. in addition to what would have been the charge but for this duty being payable, still that sum is paid by the passenger, it is received by the railway company, and all that the traveller gets for it is the passage from one place to another, so that it comes within the express terms of the Act of Parliament, and the Crown is entitled to the duty on it. If we were called upon to decide whether the railway company can properly charge to the passenger this five per cent. that they have to pay as duty, my present impression is, though I do not mean to express it judicially, that looking at the language of the statute, the company have no right to make the charge. The words are, "the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the railway and of carriages and for locomotive power and every other expense incidental to such conveyance as aforesaid, except the government duty, shall not exceed the following sums." I think that means

that they have a right to make a maximum charge to include every expense except the government duty, which they have no right to charge at all. Whether that be so or not, I think the company are liable to duty upon the aggregate sum which they demand and receive from a passenger.

With regard to the second question, there might be a matter of some nicety if what is supplied were something clearly apart and different from the usual accommodation of a railway company, such, for instance, as providing a dinner or something else which really was not in any sense necessary to or connected with the passage. Looking, however, in the present case, to the description of that which the defendants provide, it seems to me that the additional accommodation only has the effect of making the railway carriage more convenient than usual, but it remains, after all, only a railway carriage better fitted up than some others.

Under these circumstances, I really do not think that any reasonable doubt can be entertained on the subject, but that the Crown is entitled to the duty of 5*l.* per cent. upon what the passenger pays, whether he pay upon one ticket or two, and whether for a carriage of an ordinary description or one of a superior description, with an amount of accommodation not to be found in an ordinary carriage. In either case it is what the passenger pays for his conveyance from one place to another, upon which duty must be paid. I think, therefore, the Crown is entitled to the judgment of the Court.

HAWKINS, J. I am of the same opinion. The Crown is entitled to a duty at the rate of 5*l.* in every hundred for the hire, fare, or conveyance of passengers. On the first question which is raised, it appears that the company being bound to pay a passenger duty of 5*l.* per cent. have added five per cent. to the ordinary fares which they would otherwise have charged. They then say tha the Crown is only entitled to a duty of 5*l.* per cent. upon that sum of money which would represent the fair sum for the conveyance of the passenger, and not upon the sum which has been added in order to cover the duty. I do not think that that is a right way to look at the matter. I think that however the sum actually

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charged the passenger for his conveyance is made up, in fact whatever may be passing in the minds of those who settle the rates and fares, the whole sum they receive from a passenger in respect of his carriage from one place to another is, properly and strictly speaking, "a sum received or charged for the hire, fare, or conveyance of such passenger."

Upon one point that was raised, though I do not think it necessary to decide it, I cannot help expressing an opinion. I think it is immaterial whether the company are strictly entitled to charge the particular sum which they do, for I am of opinion that if a railway company charges fares in excess of those sanctioned by Act of Parliament, the duty would be chargeable upon the sums which they have actually charged and received. The legislature does not say that they shall be liable to the duty in respect of all sums which they are entitled to charge and which they do charge, but the duty is imposed upon "all sums received or charged for the hire, fare, or conveyance of passengers." It is no answer, therefore, to say that the charge is in excess of that which the company are entitled to make, and might be resisted by the passenger, for the passenger has not resisted but has paid, and the company have received the money.

As regards the second point I confess that at first it seemed to me there was reason in the defendants' contention. I quite concede that a case might happen where the sort of accommodation provided would be by no means incidental to the mere transit of passengers. Suppose, for instance, an ordinary drawing-room saloon, as it is called, and a library were fitted up, and newspapers provided and coffee served to all persons on the journey, it would be absurd to say that those were things incidentally connected with the carriage so as to make a charge for that a charge for the conveyance. But that, looking to the statement of the accommodation afforded, is not the case here; and moreover, even if the company were entitled to make these separate charges for matters not incidental to the conveyance, they have not in point of fact done so. What they have done is to charge one lump sum as for the ordinary first-class fare, and secondly, an additional sum for the right conferred on the passenger to travel in a more luxurious carriage. A luxurious sleeping-apartment is as much incidental,

as it strikes me, to the conveyance as is "first-class" itself. The mere conveyance may be by the bare boards afforded by a truck, more luxurious accommodation is afforded by a third-class carriage, still more by the second, and so on up to the best in the way of sleeping accommodation. I confess I see no reason to distinguish this and to say that it is not incidental to the travelling, any more than I should think of saying that the extra accommodation of a first-class carriage with cushions and curtains is not essential to the conveyance, because some persons travel second and some third-class. If there really is an extra expense entailed upon the defendants in providing that sort of accommodation which does not belong and is not incidental to the actual conveyance of a passenger, as, for instance, shunting the carriage for him after he arrives at the end of his journey, and calling him, and providing him with hot water as if he were in an hotel, I should be far from saying that a separate charge might not be made for that, but it seems to me that the company have not provided and made a charge for hotel accommodation. They have charged for the conveyance at an increased rate, for which they have provided conveniences which they were not bound to provide. This is just what they do in an ordinary way where a passenger has the convenience of a waiting-room and refreshment-room. It would be idle to contend that these things could be separated from the conveyance so as to exempt some portion of the ordinary fare from duty, because it might be said to represent the value of this accommodation. I think that the company are liable to pay five per cent. in respect of the extra charge for this sleeping accommodation, upon the simple ground that the charge so made is charged for and is incidental to the conveyance of the passenger.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *R. F. Roberts.*

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Dec. 10.

FINCH AND ANOTHER *v.* THE GREAT WESTERN RAILWAY COMPANY.

Right of Way—Award under Inclosure Act—Enlargement of User of Way.

Where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant.

By an inclosure award a road was set out as a carriage road and drift way from a highway to certain of the inclosed lands. The defendants, a railway company, acquired some of these lands, and built a cattle pen thereon adjoining their railway, and used the road for the passage to and from the highway of cattle that were to be or had been conveyed on their railway, such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes:—

Held, that this was a lawful user on their part, and that they were not restricted to the user which existed at the time of the grant.

SPECIAL CASE, from which the following facts appeared.

The claim in the action was for damages for trespasses alleged to have been committed by the defendants on certain lands of the plaintiffs, known as Broadmead Drove or Fisherton Drove, in the parish of Fisherton-Anger, in the county of Wilts, and for an injunction to restrain the defendants from committing further trespasses of a like nature.

In the year 1790 certain open and common lands in the parishes of Berwick St. James, and Fisherton-Anger, in the county of Wilts, were inclosed under an Act 29 Geo. 3, c. xlii. The commissioners allotted certain roads, and among others the following:—"One other private carriage road and driftway of the breadth of twenty feet, called Broadmead Drove, branching out of the turnpike road leading from Salisbury towards Wilton, at or near the north-west corner of Churchfield, and extending from thence in a southward direction by the west side of Churchfield over an allotment hereinafter described, and awarded to the said James Lord Malmesbury, to a small old inclosed meadow belonging to the said James Lord Malmesbury, called Spring Ditch Close, and then turning westwards and continuing over the same allotment to the said James Lord Malmesbury, to the east corner of an old inclosed meadow belonging to James Feltham, which

said road or way we the said commissioners do hereby award, order, and appoint, shall for ever hereafter remain a private carriage road and driftway for the use of the respective owners and occupiers for the time being of the allotment over which the same passes, and of several old inclosed meadows and woodlands belonging to the said James Lord Malmesbury, a meadow called Broadmead belonging to William Hayter, Esquire, and the said inclosed meadow belonging to James Feltham to which the same road leads."

The freehold of the land over which the last-mentioned private carriage road and driftway passed became vested in the plaintiffs.

An allotment on the east side of Broadmead Drove containing 4*a.* 1*r.* 11*p.* was, inter alia, allotted to James Lord Malmesbury. The defendants became possessed in fee simple under their statutory powers for the purposes of their undertaking of a small portion of the above-mentioned allotment of 4*a.* 1*r.* 11*p.* from the successors in title of William Hayter, who had obtained the same by exchange with Lord Malmesbury, and on it they erected a cattle-pen.

The cattle-pen had been used by the defendants for some time past for the purpose of collecting cattle conveyed to that spot by them as carriers on their railway, or else to be conveyed thence by them in a similar manner. For this purpose cattle were driven from the cattle-pen along the Drove to the highway, and also from the highway along the Drove to the cattle-pen.

No public road exists from the cattle-pen to the highway; but before any land was acquired by the defendants it had been the undisputed practice for many years for owners and occupiers of the lands lying on either side of the Drove (including the lands now belonging to the defendants) to drive as of right along the Drove cattle to be pastured upon, or that had been pastured upon such lands, and carts loaded with agricultural produce, fodder, and manure, that had been produced upon or were required for use upon such lands to and from the turnpike road. All rights of the former owners and occupiers of the lands of the defendants arising out of such ownership and occupation became vested in the defendants.

The plaintiffs were owners of a large lunatic asylum close to

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the Drove, and the traffic occasioned by the defendants so driving cattle on the Drove was accompanied by much noise, which was heard in the asylum.

The plaintiffs and their predecessors in title always repaired the Drove at their own expense, and were put to expense in keeping it in repair, on account of the use made of it by the defendants as above-mentioned.

The plaintiffs contended that by the terms of the award the Drove could not be lawfully used except as a private carriage road and driftway by the owners and occupiers of the lands therein described as the allotment over which the road passes, the several old inclosed meadows and woodlands belonging to James Lord Malmesbury, the meadow called Broadmead, at the date of the award, and the inclosed meadow at that time belonging to James Feltham.

The question for the opinion of the Court was: Whether the defendants were entitled under the award or otherwise to use the Drove for the purpose of driving cattle thereon, between the cattle-pen and the highway, which cattle they had conveyed or were about to convey on their railway.

1879. Dec. 1. *A. Charles, Q.C.* (*Bromley*, with him), argued for the plaintiffs, and

Herschell, Q.C. (*Medd*, with him), for the defendants:—The arguments and cases cited appear in the considered judgment of the Court.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Kelly, C.B., and Stephen, J.) was delivered by

STEPHEN, J. This was a special case argued before us on the 1st instant. The material facts were as follows:—A highway runs from Salisbury to Wilton. The plaintiffs are the owners of certain closes on the south of this highway, and also of the soil of a drove called Broadmead Drove, which separates two of those closes.

The Great Western Railway runs parallel to the high road and to the south of the closes above-mentioned. Broadmead Drove runs to and across the railway, and thence continues its course in

a westerly direction to other closes which need not be mentioned. At the point of junction between the Broadmead Drove and the railway, the company have constructed a cattle-pen on land taken by them under their parliamentary powers, which land was formerly part of a meadow containing rather more than four acres belonging to Mr. William Hayter. The company are in the habit of driving cattle from all parts of the neighbourhood to this pen, and of collecting cattle brought by the railway from all parts of their system, and driving such cattle along Broadmead Drove to the high road and thence to other places in the neighbourhood. The question is, whether they are entitled to use the Drove in this manner, under the following circumstances:—

Before 1790 all the land in question was common field. In 1790 an inclosure award was made whereby, after recitals as to their authority and proceedings, the commissioners set out certain roads in the following words: "We have set out and appointed, and by this our award do set out and appoint, the several roads and ways in, through, and over, or by the sides of, the new inclosures or allotments to be made by virtue of the said Act, in such directions and of such breadths as are hereinafter mentioned and particularly described (that is to say), (6.) One other private carriage road and drift-way of the breadth of twenty feet called Broadmead Drove" (then follow the abuttals), "which said road or way we, the said commissioners, do hereby award, order, and appoint shall for ever hereafter remain a private carriage road and driftway for the use of the respective owners and occupiers for the time being of the allotment over which the same passes and several old inclosed meadows and woodlands," one of which was the field of about four acres in extent already referred to.

There seems to be no doubt that at the time of the award the driftway in question served merely as a mode of access to a few meadows used exclusively for agricultural purposes. The Great Western Railway now passes through some of these meadows, and the cattle-pen already mentioned is in one of them. The result, of course, is that probably thousands of cattle pass along the driftway for every one that passed when the award was made, and the question is whether such a user of the way allotted by the award can be justified.

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Upon the whole we are of opinion that it can be justified, that the right of way is general in its terms, and that though the altered circumstances of the land have greatly increased the traffic on the road, that circumstance does not affect the right of the Great Western Railway as owners and occupiers for the time being to make use of it in the manner above described.

We have not arrived at this conclusion without some difficulty, as the authorities which bear upon it are many, and some of them may not be altogether consistent.

The view presented to us on behalf of the plaintiffs was that the provisions in the award gave the owners and occupiers for the time being a right to use the private way as a driftway for bringing cattle to and from the different closes which it traverses, and for no other purpose. That is to say, the defendants' land having been agricultural land at the time when the Act passed, the road to it can still be used only to the extent to which, and in the same manner as it was used while the land was agricultural land, although the land was awarded to the predecessors of the company without any particular description, or limitation, or qualification. In support of this view reference was made to the following authorities: 1 Rolle's Abridgment, fol. 391, pl. 3; *Howell* v. *King* (1), *Lawton* v. *Ward* (2), *Allan* v. *Gomme* (3), *Skull* v. *Glenister* (4), and *Williams* v. *James.* (5) All these authorities, except *Allan* v. *Gomme* and *Skull* v. *Glenister*, refer to cases of prescription, and may be said to establish the proposition that where there is a right of way proved by user, the extent of the right must be measured by the extent of the user. The strongest and the most recent case of this kind is *Wimbledon and Putney Commons Conservators* v. *Dixon* (6), in which it was held that immemorial user of a way over Wimbledon Common for agricultural purposes did not authorize its use for the purpose of carting building materials to a place on which houses were to be erected.

Of the cases which were mentioned, two were cases of express grants, namely, *Allan* v. *Gomme* (3) and *Skull* v. *Glenister.* (4)

(1) 1 Mod. 190.
(2) 1 Ld. Raym. 75.
(3) 11 Ad. & E. 759.
(4) 16 C. B. (N.S.) 81.
(5) Law Rep. 2 C. P. 577.
(6) 1 Ch. D. 362.

These require examination, as their consistency with authorities referred to on the other side is not immediately apparent, though we do not say that they are really inconsistent. In *Allan* v. *Gomme* (1) there was reserved to the occupiers of a certain tenement "a right of way and passage over the said close to the stable and loft over the same, and the space and opening under the said loft, and then used as a woodhouse." The Court held that the meaning of this reservation was, that the defendant should be "confined to the use of the way to a place which should be in the same predicament as it was at the time of making the deed." They did not, indeed, consider that the right of way depended on the space being used as a woodhouse, but they thought it must be used "for purposes which were compatible with the ground being open, and that if any buildings were erected upon it" (which happened), "it was no longer to be considered as open for the purpose of this deed."

In *Henning* v. *Burnet* (2), Parke, B., said: "In *Allan* v. *Gomme* (1) "a more strict rule was laid down than I should have been disposed to adopt; for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of making the deed. No doubt if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered." This is quoted with approval by Malins, V.C., in *United Land Co.* v. *Great Eastern Ry. Co.* (3)

It seems to us upon the whole that the proper view to take of *Allan* v. *Gomme* (1) is that it establishes no general principle, but turns on the construction of the particular deed referred to—a deed bearing no resemblance to the grant in the present case.

In the case of *Skull* v. *Glenister* (4), a plot of land was granted to Wheeler, "together with a right of way and passage" over a certain new road to certain other roads. Glenister bought land adjoining Wheeler's close, but having no communication with the new road. He afterwards became the tenant of Wheeler's close,

(1) 11 Ad. & E. 759.
(2) 8 Ex. 187, at p. 192.
(3) Law Rep. 17 Eq. 158.
(4) 16 C. B. (N.S.) 81.

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and, wishing to build on his own close, stacked building materials on Wheeler's close, using the new road in order to bring them there. The materials were afterwards conveyed from Wheeler's close to Glenister's close. The case decides that, under these circumstances, the learned judge who tried the case was right in leaving to the jury the question "whether the defendants used the way as a way to Wheeler's land, or was it a mere colourable use of it for the purpose of getting at their own land? Did the defendants use the way merely for the purpose of carrying the building materials through Wheeler's close to their own land?" Williams, J., based his judgment on a passage in Gale on Easements, which quotes at length a passage from Rolle's Abridgment and the case of *Lawton* v. *Ward* (1), and concluded by saying, "these authorities appear to establish the principle that if the defendants here had directly used the road in question as a way over the grantor's land through Wheeler's close to Glenister's, that would have been an excess of the right. The question was whether they had not substantially done so."

On the authority of these cases, particularly on that of *Skull* v. *Glenister* (2), we were pressed to say that to use Broadmead Drove as a way on to Hayter's meadow merely in order to pass out of Hayter's meadow by the railway which, subsequently to the award, had been made through it, was an excess of the right conferred by the award. It must be admitted that there is a considerable resemblance between the cases, though they are not absolutely identical. To use a private road into one close merely in order to pass over it into an adjacent close is not quite the same thing as to use a private road into a close in order there to make use of a public highway carried through the close subsequently to the grant. We must also observe, upon the judgment of Williams, J., that all the authorities quoted in the passage from Gale on Easements are cases in which the right was prescriptive, and the question to be solved was the extent of the grant to be inferred from user. Moreover, one of the two passages quoted from Rolle (3) seems inconsistent with the inference deduced from the authorities. "In trespass for breaking his

(1) 1 Ld. Raym. 75. (2) 16 C. B. (N.S.) 81.
(3) Fo. 391, pl. 2.

close, if the defendant justifies going over this close because he hath used time out of mind to have a way over it from D. to Blackacre, and the plaintiff replies that at the time of the trespass the defendant went with his carriages from D. to Blackacre, and thence to a mill, this will not maintain his action, for when the defendant was at Blackacre he might go whither he would." These considerations are not without their weight, though probably, if they stood alone, we should not regard them as warranting us in differing from *Skull* v. *Glenister*. (1) There are, however, several later decisions on cases closely analogous to the one before us which must now be considered. Before examining them we may remark that one distinction between the cases cited on behalf of the plaintiff and the case before the Court is, that the former are cases of a grant of a way, or of prescription, which implies a grant. The latter is one in which the way is granted under an award made under an Inclosure Act, which grants to the predecessors in title of the defendants a piece of land, which they are entitled to enjoy without restriction or limitation. In this the case before the Court resembles the cases which we now proceed to consider. They seem to us to establish the principle that where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant. The first of these cases is the *United Land Company* v. *Great Eastern Ry. Co.* (2) In this case the Great Eastern Railway purchased from the Crown land for the purpose of their line, intersecting land acquired by the Crown under an Act of Parliament which prohibited building upon it, as it was within the range of the guns of a fort. At the time of the purchase the land was used only for pasture. The Great Eastern Railway agreed to make four level crossings over their line, by which access could be had from one part of the severed land to the other. Some years after the agreement the part of the land beyond the crossings was sold to the United Land Company, and the statutory prohibition against building being removed, the land was laid out in lots for building purposes. The railway company

(1) 16 C. B. (N.S.) 81. (2) Law Rep. 17 Eq. 158; Ibid. 10 Ch. 586.

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considered that the level crossings ought not to be used for purposes of access to the houses so built. It was, however, held both by Malins, V.C. (1), and afterwards by the Court of Appeal in Chancery (2), that they were so entitled on the ground that "the crossings were to be communications for every purpose for which at the time or at any future time the owner should think fit to appropriate his land." This comes very near to the case before us, though no doubt there were several circumstances in the grant which threw more light on the actual intention of the parties than is to be had in the case before us.

Newcomen v. *Coulson* (3) more closely resembles the present case. An inclosure award made in 1760 set out certain roads for the owners for the time being of certain allotments and their tenants and farmers to and from certain allotments. It was provided that one of the roads should be thirty feet wide, and that if any owner of an allotment should "street out" the way it should always remain eleven yards wide between the quick-sets. More than a century after the award was made one of the allotments was used as building land, and the owner began to convert the cart road into a metalled road. The plaintiffs sued to restrain him from doing so and from using the right of way for other than agricultural purposes, but the application was refused by Malins, V.C., and his decision was upheld by the Court of Appeal. In delivering his judgment, the Vice-Chancellor said, "I am at a loss to see any principle on which a person who takes land under an inclosure is bound for all time to use that land for the purpose for which it was used when the inclosure was made. If that is the case here it is the case all over the country, and I suppose hundreds of thousands, if not millions, of acres of land would have this principle applied to them, that the owner of the land under the inclosure could only use the land for the purpose for which it was used when the inclosure was made, that is for agricultural purposes, because, although they might use the land for other purposes, they could not use the roads for other purposes." The Vice-Chancellor also laid stress on the case of *Dand* v. *Kingscote*. (4) The pleadings in this case are exceedingly complicated, but the

(1) Law Rep. 17 Eq. 158.
(2) Law Rep. 10 Ch. 586.
(3) 5 Ch. D. 133.
(4) 6 M. & W. 174.

effect of the decision is shortly stated thus by Malins, V.C.: "The decision in *Dand* v. *Kingscote* (1) was that a reservation of a right of way from and to the colliery entitled the man who had the right" (upwards of 200 years after it was reserved) "to adapt it to the improvements of the age, and the improvements of the age required that he should have a right to use a locomotive over the land." A right of way which was granted to give access to pastures may lawfully be used for access to a town subsequently built on them; and if a way-leave reserved for working a colliery by horse power may lawfully be worked by steam power, it seems difficult to resist the inference that a driftway which when granted gave access to pastures may be used for the purpose of access to a railway station afterwards built upon it.

Mr. Charles attempted to distinguish *Newcomen* v. *Coulson* (2) from the case before us on a variety of grounds. He said that in *Newcomen* v. *Coulson* (2) the road was thirty feet wide, which the Vice-Chancellor regarded as clear proof that it was never intended to be confined to agricultural purposes only. He also pointed out that the owner of the allotment had power expressly reserved to "street out" the road, and he observed lastly that the object in that case undoubtedly was to get access to the allotment and not to go beyond it. None of these distinctions appear to us to be substantial. As to those which turn upon the character of the road, it must be observed that in the present case no question as to the character of the road arises. It retains the width and character specified in the award. It is, as it always was, a driftway twenty feet wide. The only difference in its user is that more cattle now pass along it than was formerly the case. As to the point that in *Newcomen* v. *Coulson* (2) the road led to the allotment in its new condition, whereas in this case the cattle pass away from it by the railway, it appears to us that it would be impossible to maintain that, if people were to have free access by a private way to new houses built on an allotment, they should be bound as often as they used that way to return by it, instead of using any other road which might happen to be open to them.

It is remarkable that *Skull* v. *Glenister* (3) was not cited in the

(1) 6 M. & W. 174. (2) 5 Ch. D. 133.
(3) 16 C. B. (N.S.) 81.

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argument on *Newcomen* v. *Coulson*. (1) It appears to us that if the two are inconsistent, we must follow *Newcomen* v. *Coulson* (1), but the cases may be reconciled (though the reasoning in the judgment of Williams, J., seems scarcely consistent with the latter case) by treating *Skull* v. *Glenister* (2) as deciding only that if there is a private right of way to one close, it must not be used colourably with the real intention of going to a different though adjoining close. Upon the whole, therefore, there will be judgment for the defendants with costs of the action and special case.

Judgment for the defendants.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Co., for C. M. C. Whatman, Salisbury.*

Solicitor for defendants: *R. R. Nelson.*

Dec. 11.

[IN THE COURT OF APPEAL.]

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Vendor and Purchaser—Conveyance of Land adjoining intended Highway—Presumption as to Ownership of Soil of intended Highway—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27), *ss.* 2, 3—*Dispossession of Owner of Land—Discontinuance of Possession—User of Land.*

The presumption that the soil of a highway belongs to the owner of the adjoining land, usque ad medium filum viæ, does not apply to ground, which was intended to be used as a highway, but has never been dedicated to the public; and if the owner of the soil of the intended highway disposes of the adjoining land by conveyances in which it is described as bounded by the intended highway, the grantees do not acquire by presumption of law the ownership of the soil of the intended highway.

Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a "dispossession" of him, and are not evidence of "discontinuance of possession" by him within the meaning of 3 & 4 Wm. 4, c. 27, s. 3.

In 1854 L. conveyed to the defendant a plot of land upon the south side of an intended street, upon which the defendant built a factory. In 1857 L. conveyed to certain trustees the plot of land upon the north side of the intended street, which in 1872 vested in the defendant. Neither of the conveyances granted in express terms the soil of the intended street, but they described the plots of land as bounded by it. It was never dedicated to the public as a highway. From

(1) 5 Ch. D. 133. (2) 16 C. B. (N.S.) 81.

1854 the defendant had placed upon the intended street materials used at his factory, so as to block it up except as against foot passengers, and in 1865 he enclosed an oblong portion of it. In 1872 he fenced in the ends of the intended street. The plaintiff was tenant for life of all the land of which L. had died seised, and in 1876 commenced an action to recover the site of the intended street. Within twenty years before action L. had repaired a gate at one end of the intended street:—

Held, first, that the conveyances executed by L. in 1854 and 1857 did not by presumption of law grant the soil of the intended street; secondly, that the title of the plaintiff was not defeated by the Statute of Limitations (3 & 4 Wm. 4, c. 27), ss. 2, 3.

SPECIAL CASE stated by an arbitrator in an action of ejectment pursuant to a judge's order.

The land sought to be recovered was situate in the township of Kirkdale, and within the borough of Liverpool. One part of it was the soil of an intended street, called Grundy Street, running from east to west, and leading on the east into Victoria Road, and on the west into Regent Road. It was bounded upon the north by land conveyed to the Mersey Dock Trustees in 1857, as hereinafter mentioned: it was bounded upon the south at the eastern end by Napier Place, and along the rest of the line of the street by land conveyed to the defendant in 1854, as hereinafter mentioned. The other part was Napier Place, a triangular piece of land having its apex towards the south, and at its base immediately adjoining the east end of the south side of Grundy Street. Napier Place was bounded upon the east by Victoria Road, and upon the west by the piece of land conveyed to the defendant in 1854. The plaintiff was tenant for life of all the lands of which J. S. Leigh had died seised.

In 1854, J. S. Leigh being seised in fee of a piece of land lying to the south of Grundy Street and to the west of Napier Place, conveyed it to the defendant in fee, subject to a ground rent. The piece of land conveyed was thus described in the deed: "All that piece of land situate, lying, and being in the township of Kirkdale, within the borough of Liverpool, in the county of Lancaster, and on the east side of Regent Road, south side of Grundy Street, and west side of Napier Place in Victoria Road in Liverpool aforesaid, bounded on the north by Grundy Street, on the east by Napier Place, on the south in part by land formerly

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of the said J. S. Leigh, but now belonging to the Lancashire and Yorkshire Railway Company, and in the remaining part by land lately conveyed by the said J. S. Leigh to the said J. Jack on which the said J. Jack hath erected an iron foundry and other buildings, and on the west by Regent Road aforesaid, and which said piece of land intended to be hereby granted measures in front to Regent Road aforesaid 145 ft., to Grundy Street 252 ft. 6 in., to Napier Place 137 ft. 5 in., and on the south side thereof 297 ft. 10 in., and containing in the whole 4259 square yards of land or thereabouts, being the said several dimensions and quantity a little more and less." The 4259 square yards were the total contents of the land south of Grundy Street, and did not include any portion of the site of that street. On the 19th of March, 1857, the said J. S. Leigh, by deed of that date, conveyed to the Mersey Dock Trustees the piece of land lying to the north of Grundy Street. The material parts of the deed were as follows: "The said J. S. Leigh doth by these presents grant and confirm unto the said trustees of the Liverpool Docks, their successors and assigns, 'inter alia,' all that piece or parcel of land situate in the township of Kirkdale aforesaid, bounded on or towards the south by a public road or street called Grundy Street, ... together with the free use and enjoyment of all the said streets, roads, and passages, for all purposes in common with all other persons lawfully entitled to use the same." The total contents did not include any portion of the site of Grundy Street. On the 30th of March, 1872, the last-mentioned piece of land was by deed conveyed by the Mersey Dock Trustees to the defendant.

Grundy Street and Napier Place were names used to describe certain portions of waste land belonging to J. S. Leigh, and which he had at one time contemplated dedicating to the public as streets, and they were marked as streets on a plan of that portion of the Leigh estates, which he caused to be prepared and hung up in the Leigh Estate Office with a view to the sale or lease of portions of the estate for building. Grundy Street and Napier Place were never in fact used by the public as highways. Save as before stated, J. S. Leigh never dedicated Grundy Street or Napier Place to the public.

Up to the time of the enclosing of Grundy Street by the

defendant, as hereinafter mentioned, Grundy Street was separated from Regent Road by a fence consisting of posts and a swing rail. The fence was repaired and renewed within the twenty years next before this suit and after the purchase by the dock board, both by J. S. Leigh and by the defendant. Immediately after the conveyance to the defendant, executed in 1854, the defendant caused a rough post and rail fence to be put along the northern boundary of Grundy Street for the purpose of defining the said boundary. Immediately after the conveyance executed in 1857 to the Dock Board Trustees, they caused a substantial post and rail fence to be erected along the northern boundary of Grundy Street. Soon after the conveyance of the piece of land in 1854, the defendant erected on it a foundry and ironworks along the southern boundary of Grundy Street, with windows looking out into that street and into Napier Place, and a gateway leading into Napier Place. From that time down to the date of the enclosure in 1872 hereinafter mentioned, the defendant, by placing a quantity of old graving dock materials, screw propellers, and boilers, and refuse from his foundry over the surface of Grundy Street and Napier Place, rendered them impassable for carts and horses. Persons on foot did, however, occasionally down to that date pass along Grundy Street from Victoria Road to Regent Road. In 1865 the defendant enclosed an oblong piece of Grundy Street situate at the west end on the south side. In 1872 the defendant completely enclosed the pieces of land called Grundy Street and Napier Place on the west and east sides respectively.

No complaint was made on behalf of the Leigh family with respect to any of the acts of the defendant until 1875, when the agent of the Leigh estates, in an interview with the defendant, stated that he would report to his employers the fact of the enclosures by the defendant. The action was commenced in April, 1876.

It was contended on behalf of the plaintiff that she was entitled as against the defendant to the possession of the piece of land in respect of which the action was brought. It was contended on behalf of the defendant, first, that he had acquired a title to the land by possession of more than twenty years next before suit; secondly, that by virtue of the deeds coupled with the facts above

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stated, all Grundy Street and the western portion of Napier Place, usque ad medium filum viæ, had been vested in him. If and so far as it was a question of fact, the arbitrator found as a fact that the defendant had not acquired a title by possession and user only to any portion of the land sought to be recovered.

The question for the opinion of the Court was, whether the plaintiff was entitled to eject the defendant from the possession of the land sought to be recovered, or any part of it.

The Exchequer Division (Kelly, C.B., and Cleasby, B.) gave judgment for the plaintiff.

The defendant appealed.

Dec. 8, 11. *C. Russell, Q.C.*, and *W. H. Butler*, for the defendant. The first question is, whether the presumption as to the ownership of the soil of an existing highway extends also to land intended to be dedicated as a highway: that presumption is that the soil to the middle of the highway belongs to the owner of the adjoining enclosed land and passes by his conveyance: *Simpson* v. *Dendy* (1); *Berridge* v. *Ward*. (2) The presumption extends even to the soil of private ways: *Holmes* v. *Bellingham*. (3) The effect of the authorities cited during the argument in *Lord* v. *Commissioners of Sydney* (4) seems to be, that upon a similar presumption of law riparian owners are seised of the bed of a stream ad medium filum aquæ. No doubt the presumption is liable to be rebutted: *Marquis of Salisbury* v. *Great Northern Ry. Co.* (5); and the plaintiff's counsel may rely upon *Plumstead Board of Works* v. *British Land Company* (6); but in that case the land conveyed had been sold in lots. This is an action for the recovery of land: the plaintiff is bound to make out her case: the burden of proof is cast upon her.

[BRAMWELL, L.J. The plaintiff shews that the soil of Grundy Street and Napier Terrace did once belong to J. S. Leigh, through whom she claims, and she challenges the defendant to

(1) 8 C. B. (N.S.) 433, per Willes, J., at p. 472.
(2) 10 C. B. (N.S.) 400, per Erle, C.J., at p. 415, and per Williams, J., at p. 416.
(3) 7 C. B. (N.S.) 329.
(4) 12 Moo. P. C. 473.
(5) 5 C. B. (N.S.) 174.
(6) Law Rep. 10 Q. B. 16.

prove that her title has been defeated by some subsequent event. The burden of proof is shifted.]

Secondly, even if the soil of Grundy Street and Napier Place did not pass ad medium filum viæ by the conveyances executed in 1854 and 1857 by J. S. Leigh, the title of the plaintiff has been defeated by the Statute of Limitations (3 & 4 Wm. 4, c. 27), ss. 2, 3. (1) The plaintiff and her predecessors in title have not occupied the land sought to be recovered for the space of twenty years, and since 1854 the defendant has occupied the soil of Grundy Street by placing thereon the materials used by him. Therefore, the plaintiff and her predecessors have been "dispossessed," and also they have "discontinued possession" within the meaning of that statute.

Herschell, Q.C. (*Gully, Q.C.*, with him), for the plaintiff.

[PER CURIAM. We do not require to hear any argument from the plaintiff's counsel as to the first question urged on behalf of the defendant.]

The second question depends upon the facts stated in the special case, and from these it is clear that the plaintiff and her prede-

(1) By 3 & 4 Wm. 4, c. 27, s. 2, "No person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

Sect. 3: "In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say), when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession or at the last time at which any such profits or rent were or was so received."

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which came into operation on the 1st of January, 1879, further limits the time within which actions may be brought for the recovery of land; by s. 1, the period of twelve years is substituted for the period of twenty years; and s. 9 repeals, amongst others, s. 2 of 3 & 4 Wm. 4, c. 27, above set out.

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cessors in title have not been out of possession for the period of twenty years. The acts of the defendant were consistent with the intention of J. S. Leigh, namely, that the soil of Grundy Street should be at some time dedicated to the public as a highway; the defendant only used the land until that intention could be carried out.

[He was then stopped.]

COCKBURN, C.J. As to both the questions argued before us, we think that the contention on behalf of the defendant cannot be sustained.

I will first deal with the question whether the defendant as adjoining owner must be presumed to be seised of the soil of Grundy Street and Napier Place. It is to be recollected that we have to construe conveyances of land situated within a town, and to be used in all probability for building purposes, and lying upon each side of an intended street. I think that the legal presumption as to the ownership of the soil of a highway does not apply to intended streets. That presumption is founded upon a reasonable probability as to the intention of the adjoining owners, and it lays down a principle which has a very convenient operation. It is presumed that those who were seised of the neighbouring land devoted the surface of their soil to the public, in order to confer a common benefit on all those desirous of using the highway, without, however, parting with the ownership of the soil itself. This doctrine applies where the evidence as to the ownership of the soil of the highway has been lost either by lapse of time or from other causes; but in the present case the boundaries of the property conveyed are known, and its extent can be ascertained, and under these circumstances it cannot be assumed that the grantor meant to divest himself of the soil of the road, or that the conveyances were intended to have an operation more extensive than that which their language imported. The presumption relied upon does not apply in the case of a recent grant or conveyance.

The second question depends upon the effect of the Statute of Limitations, and renders it necessary to consider whether the plaintiff or her predecessors in title have been dispossessed of the

soil of Grundy Street and Napier Place. Nothing besides the acts of the defendant has been relied upon as creating a dispossession, and those acts do not amount to a dispossession. I think the conclusion of fact arrived at by the arbitrator right. The plaintiff and her predecessors in title did not intend to abandon the ownership of the soil; it was intended by the parties to the conveyances that a way should run in front of the pieces of land granted by J. S. Leigh, and that subject to this burden the soil should remain in him and his representatives. I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The defendant simply used the land until the time should come for carrying out the object originally contemplated. If a man does not use his land, either by himself or by some person claiming through him, he does not necessarily discontinue possession of it. I think that the title of the plaintiff is not barred by the Statute of Limitations.

BRAMWELL, L.J. I also am of opinion that the plaintiff is entitled to succeed.

The first question is, what passed by the conveyances executed by J. S. Leigh? In order to ascertain that, we must look at the surrounding circumstances existing when the pieces of land were granted. If a man sells all his land at Dale, and if the land is bounded by public roads, the soil of the roads passes usque ad medium filum viæ; in like manner if he sells his field at Dale, the soil of the adjoining roads will pass to the grantee; and if by the terms of his grant he states the boundary of his field in popular language, the result will be the same; for it can be properly contended that the vendor did not convey less, than if he had in his grant simply used the word "field." That appears to be the principle which applies to an ordinary conveyance; but how can it apply to the facts before us? At the time when these conveyances were executed, no street existed in fact; before the pieces of land were conveyed, J. S. Leigh might have made the intended street either wider or narrower as he deemed to be more advisable for his remaining property, and upon this state of facts

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a cogent argument arises against the contention for the defendant, namely, that if J. S. Leigh, after the execution of the conveyances, had wished to make the street according to the original scheme, he might have debarred himself from so doing; for his grantees might have interfered to prevent any disturbance of the soil which had passed to them. I think that the case is clear as to the piece of land granted in 1854 and lying upon the south side of Grundy Street; but I own that I have had a misgiving whether the case is equally plain as to the piece of land lying upon the north side. I think, however, that when the surrounding facts are looked at, it becomes manifest that it was not intended to grant the soil of Grundy Street and of Napier Place. The piece of land conveyed by J. S. Leigh in 1857, was described in the deed as "bounded on or towards the south by a public road or street called Grundy Street;" these words may be thus paraphrased, "bounded on or towards the south by a piece of land, which I, the grantor, intend to dedicate to the public, and to call Grundy Street." If the words be read in this sense, it plainly appears that even by the conveyance made in 1857 the soil of Grundy Street ad medium filum viæ did not pass to the grantees.

The second point relates to the true construction of the Statute of Limitations, s. 3. Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. It is difficult to suppose a case where it can be doubtful whether there has been a discontinuance of possession as to a house; if any chair or table, or other small article of furniture be left, there is strong evidence of an intention that there shall be no discontinuance of possession; but it is possible to conceive a case of discontinuance of possession as to a piece of land where the former owner does nothing to it for the space of twenty years. In the present case, if the plaintiff and her predecessors had done nothing for twenty years to Grundy Street and Napier Place, it might have been possible to argue that there had been a discontinuance of possession. But, after all, it is a question of fact, and the smallest act would be sufficient to shew that there was no discontinuance. The arbitrator has found as a fact that the defendant did not acquire a title by possession and user only to any portion of the land. The arbitrator probably meant that

he stated the facts in order that it might be determined by the Court whether the plaintiff and her predecessors had been dispossessed or had discontinued possession, but that so far as it was a question of fact he found it in the plaintiff's favour. I think that the arbitrator was right, and the circumstance that J. S. Leigh within twenty years before suit repaired the fence separating Grundy Street from Regent Road is strong to shew that there was no discontinuance. I do not think that there was any dispossession of the plaintiff by the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes. The plaintiff has not been dispossessed, nor has she discontinued possession, her title has not been taken away, and she is entitled to our judgment.

COTTON, L.J. The first question depends upon the construction of the conveyances mentioned in the special case. Neither of them conveys the soil of the street in express terms, but the defendant relies upon a presumption of law by which, he alleges, the soil is vested in him. This presumption is well known: it is assumed, in the absence of express evidence, that the adjoining owners have contributed to the formation of the road, and have dedicated it for the public benefit; it is reasonable, therefore, that when a man grants all his land or all his fields, he should be held to grant also the soil of such roads as may form the boundary of his property, usque ad medium filum viæ. But this doctrine depends upon a presumption which may be rebutted: it applies to existing roads: but no case has been cited where it has been held to extend to a conveyance of land adjoining a piece of land intended to be dedicated as a highway. I think that in such a case as that the grantor remains owner of the soil of the intended road. It may be necessary to do much before the dedication can be

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effected; and if the grantor parts with the soil of the intended road, it may become impracticable to carry out this intention, unless, indeed, the indenture contains a covenant by the purchaser to dedicate the road, which after all affords but an imperfect remedy. It is right to allude to the language of the conveyance executed in 1857: it is not identical with the language of the conveyance executed in 1854, but the difference is not so great as to require us to put a different construction upon it. When the piece of land was granted in 1854, one half of the site of the intended road must have been retained by J. S. Leigh, even according to the view put forward on behalf of the defendant: this circumstance alone renders it doubtful whether the presumption can be applied. It is to be further recollected that although the sites of Grundy Street and Napier Terrace had been marked out, yet no right of way existed over them. I decide this case for the reasons which I have already mentioned, but I wish to remark that I think it very questionable whether the presumption can ever be held to extend to those cases, where land is sold in plots for building purposes, even although the roads have been actually laid out.

As to the second question, which depends upon the Statute of Limitations, I am of opinion that there was no dispossession of the plaintiff or her predecessors by the acts of the defendant. The finding of the arbitrator that the defendant did not acquire a title by possession and user only is important to be considered. In deciding whether there has been a discontinuance of possession the nature of the property must be looked at. I am of opinion that there can be no discontinuance by absence of use and enjoyment where the land is not capable of use and enjoyment. In the present case the property sought to be recovered is a piece of land intended to be dedicated to the public as a road. At one end of it was a fence consisting of a post and rails; within twenty years before action this fence was repaired by J. S. Leigh; this was a user of it sufficient to defeat the operation of the Statute of Limitations. Even if the acts of the defendant could be held to amount to an ouster of the plaintiff and her predecessors in title, there has been a possession by them of the soil of Grundy Street and Napier Place within twenty years.

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Both points which have been raised on behalf of the defendant fail, and the judgment of the Exchequer Division must be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Gregory, Rowcliffes, & Rawle.*

Solicitors for defendant: *Sole, Turner, & Knight, for T. & W. Dodge & Phipps, Liverpool.*

[IN THE COURT OF APPEAL.]

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May 12.

JONES *v.* BAXTER.

Practice—Application for New Trial—Action commenced in Chancery Division—Divisional Court—Rules of Court, Orders V., rule 4 (*a*); *XXXIX., rule* 1—*New Trial of Issues.*

When an action, commenced in the Chancery Division, has been tried by a jury before one of the judges of a Common Law Division it is thenceforth transferred to the division to which the judge belongs, and an application for a new trial must therefore be made to a divisional Court of that division.

But this does not apply to an action in which an issue has been directed by a judge of the Chancery Division. The action in that case still remains attached to the Chancery Division.

IN this case an action to recover damages for breach of contract was brought in the court of Vice-Chancellor Bacon. The plaintiff, wishing to have the case tried by a jury, set down the case in the general list for Middlesex, and it was tried before Hawkins, J., at Westminster, on the 7th of May, 1880, when the jury found a verdict for the defendant.

On the 11th of May the plaintiff applied to a divisional Court of the Exchequer Division, to which division Hawkins, J., belonged, for an order nisi for a new trial. Their Lordships were willing to make the order, but doubted their jurisdiction, and advised the plaintiff to apply to Vice-Chancellor Bacon. This the plaintiff did, but the Vice-Chancellor was clearly of opinion that the action was now attached to the Exchequer Division, and declined to make any order. The plaintiff renewed the application to the Court of Appeal.

Holt, in support of the application. The doubt is whether the

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plaintiff ought to apply for a new trial to a judge of the Chancery Division in which the action was commenced, or to a divisional Court of the Common Law Division to which Hawkins, J., belongs. The decision in *Hunt* v. *City of London Real Property Company* (1) seems to be a distinct authority that he ought to apply to a Common Law Division. But there is a dictum in *Warner* v. *Murdoch* (2) that application in such cases should be made to the Chancery Judge before whom the action was set down.

[JESSEL, M.R. The action has now become attached to the division to which the judge belongs who tried the action. This is the effect of the rule made in March, 1879. Order V., rule 4 a: "If in any action commenced and pending in any one of the Queen's Bench, Common Pleas, or Exchequer Divisions, of the High Court, the trial shall take place before a judge of another of the said divisions, the case shall from that time be transferred to the division of which such judge is a member." So that the action is now transferred to the Exchequer Division. That is just what we decided in *Hunt* v. *City of London Real Property Company*. (1)]

That appears also to have been Mr. Justice Hawkins' opinion at the trial. He said, "We have got the action and we shall keep it; there is a rule to that effect." But the Chancery Division is not referred to in the rule, and Vice-Chancellor Hall has recently heard an application for a rule nisi for a new trial when there had been an issue directed in one of his causes.

JAMES, L.J. Where there has been an issue directed, that is done for the Vice-Chancellor's own assistance, and the case is still pending in his court.

JESSEL, M.R. The whole matter was before the Court in *Hunt* v. *City of London Real Property Company*. (1) We thought that the words "tried in" had been left out by mistake from Order XXXIX., rule 1, and we decided that it must be read as if they had been inserted. The old rule contained those words.

JAMES, L.J. The Court in that case thought that it was absolutely necessary to find some mode in which a new trial in

(1) 3 Q. B. D. 19. (2) 4 Ch. D. at p. 755.

an action originally set down in the Chancery Division could be obtained, and they could not find any other place except the Common Law Divisional Court. It seemed to the Court that that was the reasonable and necessary interpretation of the Orders. I concur in that view, and I think that the expression of our opinion in the present case will be sufficient to induce the Exchequer Division to retain the matter which is before them.

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BAGGALLAY, L.J., concurred.

JESSEL, M.R. It must be understood that our decision does not apply to the case of an issue directed by a judge of the Chancery Division.

Solicitor: *W. Crook.*

COLLEY AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY AND THE GREAT WESTERN RAILWAY COMPANY.

May 11.

Railway—Accommodation Works—Damage arising from Insufficiency—Right of Action excluded by Statutory Remedy—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 68–73.

A railway company constructed a culvert to carry off water from land adjacent to the railway. No complaint was made by the owner of the land of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by the Railways Clauses Consolidation Act, 1845, s. 73. An injury having subsequently arisen to the land from the insufficiency of the culvert to carry off all the water, an action in respect of such injury was brought by the occupier against the railway company in which it was alleged that the culvert was insufficient:—

Held, on demurrer, that the action would not lie.

DEMURRER to a reply.

The statement of claim alleged that the plaintiffs were tenants of a farm and the defendants railway companies; that before the construction of the culvert hereinafter mentioned the farm was drained as of right by a natural watercourse; that the Shrewsbury and Hereford Railway Company, which undertaking afterwards became vested in the defendants, pretending to act in the execution of certain powers conferred upon them by authority of

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Parliament, constructed about the year 1853 a culvert upon the farm for the purpose of carrying the water from it and draining it through another channel, and that the culvert was constructed in an insufficient manner so as not to carry the water from the farm, and the defendants had allowed the culvert to remain an insufficient culvert, whereby in 1879 damage had accrued to the plaintiffs by reason of the flooding of their land.

The parts of the statement of defence and reply material to the decision were—

Statement of defence: "5. The making of a culvert for the purposes mentioned in the statement of claim was an accommodation work within the meaning of ss. 68 to 73 (both inclusive) of the Railways Clauses Consolidation Act, 1845, and the questions in this action relate, not to the maintaining or repairing but to the making of a proper culvert, and if no sufficient culvert was made by the Shrewsbury and Hereford Railway Company during the construction of the railway the plaintiffs and their lessors, or the predecessors of the plaintiffs in occupation or of their lessors in title, ought to have proceeded in accordance with the provisions of the said sections and not otherwise, and this action is not maintainable."

Reply: "2. As to paragraph 5 of the defence, that this action is brought to recover damages for the injuries to the plaintiff's property set out in the claim, and not to compel the defendants to make any further or additional accommodation works under the Railways Clauses Consolidation Act, 1845, ss. 68 to 73 (both inclusive) or any or either of them."

To this reply the defendants demurred.

R. S. Wright, for the defendants. The question is not of the maintaining or repairing this culvert, but whether it was a sufficient one when made. If it was not, the remedy of the landowner was that which is given by the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), in ss. 68 to 73. The plaintiffs had five years under s. 73 in which they might have applied to have insufficient works altered, and they cannot now sue the defendants.

J. O. Griffits, Q.C. (*Barnard*, with him). The statute does not

take away the common law rights of the parties, and this case is one of those in which, a party using his land for a proper purpose, an action lies only when an injury arises to neighbouring land. *Whitehouse* v. *Fellowes* (1) was a case under the Turnpike Acts' under which actions are to be brought within three months of the doing the act complained of, yet the Court held that an action would lie if brought within three months from the accruing of damage caused by an alteration of a culvert, though more than three months had elapsed since the alteration was made. So here there was nothing illegal and no negligence in the making the culvert, and no action would lie till damage arose from the insufficiency of the culvert, but when the damage arises there is nothing in the statute which restricts the right of the plaintiffs to sue.

R. S. Wright, was heard in reply.

KELLY, C.B. I am clearly of opinion that the defendants are entitled to the judgment of the Court. The case of *Whitehouse* v. *Fellows* (1) depended upon the Statute of Limitations, and any cases as to the right to claim damages for an injury done to one person by the mode in which another person may use his property which happens to be contiguous to the land of the first, are cases quite sui generis, and have no connection with the case now before the Court. Here the railway company were empowered to make a culvert. That was some twenty years or more ago. They made it, and if they had made it in such a way as necessarily and at once to occasion injury to the owner of the adjoining land, the remedy would have been obvious and immediate. The sections of the statute which have been referred to shew that it would only have been necessary to apply to the justices, and they would have taken care that the culvert was made in a proper as well as in a sufficient manner. No such application was made, and this is not a use by the defendants of their property in such a way as to injure the property of an adjoining landowner. It is in fact a damage resulting from an alleged non-compliance with an Act of Parliament, which Act of Parliament was in all respects lawfully complied with at the time the works were erected. Under these

(1) 30 L. J. (C.P.) 305.

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circumstances it is perfectly clear the defendants are not liable, and the judgment must be for the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Twisden, Parker, & Co.*
Solicitor for defendants: *R. R. Nelson.*

June 5.

[IN THE COURT OF APPEAL.]

ASHDOWN *v.* INGAMELLS.

Damages, Measure of—Agreement to sell Property in Consideration of Payment of Debts—Insolvency of Vendors—Action by Trustee for Breach of Contract —Nominal Damages.

A. & S., being traders in embarrassed circumstances, sold their business to the defendant upon condition that he should pay certain debts owing by them. This he failed to do, and left a balance of 1750*l.* unpaid to the creditors of A. & S. A. & S. afterwards liquidated their affairs by arrangement under the Bankruptcy Act, 1869, and the plaintiff having been appointed trustee, brought an action for breach of contract:—

Held, that he was entitled to recover the sum of 1750*l.*, and not merely nominal damages.

Porter v. *Vorley* (9 Bing. 93) disapproved of.

THE following are the material portions of the claim:

The plaintiff was the trustee of G. F. Allin & C. F. Smith, whose affairs were liquidated by arrangement under the Bankruptcy Act, 1869, s. 125: they had carried on business in Southwark as fruit and potato salesmen. In the autumn of 1878, Allin & Smith, being in embarrassed circumstances, applied to the defendant for assistance, and the following agreement was entered into:—

"Agreement between G. F. Allin, & C. F. Smith, of the one part (hereinafter called the vendors), and Clark Ingamells, of the other part (hereinafter called the purchaser), as follows:—

"1. For the considerations hereinafter mentioned, the vendors agree to assign the lease of the premises in one of the railway arches, Stoney Street, Borough Market, now held by them, and the goodwill of the business of potato and fruit salesmen carried on by them therein, and all the stock-in-trade, vans, horses, office

furniture, and effects belonging to the said vendors, and employed in the said business, and all the book debts now owing to the vendors, to the purchaser absolutely, and to deliver him possession of the same.

"2. The purchaser agrees to pay Mr. Harrison, a creditor of the vendors, 10*s.* in the pound, in payment and satisfaction of his debt not exceeding 400*l.* The purchaser agrees to pay all the trade debts, or to arrange with the creditors, including the debt owing to the purchaser for money lent.

"3. The balance of the bank (if any) is to be received and taken by the purchaser, and the acceptances held by Harrison, or given to him, are to be delivered up on payment to him of the 10*s.* in the pound.

"4. The purchaser will not undertake the payment of any debts or acceptances not herein mentioned.

"5. All the household furniture and effects belonging to the vendors are not included in the aforesaid sale.

"6. The vendors will forthwith hand to the purchaser all the books, and afford every assistance and explanation to him in obtaining payment of the debts, and the purchaser is to be at liberty to use the names of the vendors in any proceedings for the recovery of the debts, he indemnifying the vendors against all costs."

Allin & Smith performed the agreement on their part, and the defendant entered into and took possession of the property, effects, and premises comprised in the agreement, and carried on the business, and received and collected moneys in respect of the same.

The defendant paid or arranged the debts due to several of the creditors of Allin & Smith, including a debt of about 400*l.* due to one J. Harrison, but he had refused to pay, nor had he ever paid, the other trade debts which were then due and owing by Allin & Smith, nor did he ever arrange with the persons who were then their creditors according to the tenor of the agreement. The defendant always had notice that the property assigned to him comprised substantially the whole of the estate and property of Allin & Smith, and that the result of his refusing to carry out the agreement on his part, or to pay and arrange the debts, would

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be to oblige them to institute proceedings for the liquidation of their affairs. By reason of the defendant's default, Allin & Smith in November, 1878, were obliged to present a petition for the liquidation of their affairs, and their creditors resolved that their affairs should be so liquidated. The amount of the trade debts and creditors' claims, exclusive of the debt due to the defendant, which the defendant should have paid or arranged, was 1750*l.* or thereabouts, and the trade and other creditors had proved for the same, or claimed, or given notice of their claims under the liquidation. The trade and other creditors, whose debts and claims the defendant should have paid or arranged according to the tenor of the agreement, were mainly the only creditors of Allin & Smith.

The defence, after alleging the defendant had been induced to enter into the agreement by the fraud of Allin & Smith, contained the following paragraph: "The defendant, as to the whole statement of claim, brings the sum of one shilling into court, and says that beyond such sum the plaintiff has sustained no damage by reason of the facts stated in such statement of claim, and that such sum is sufficient to discharge the plaintiff's claim."

The action came on for trial before Huddleston, B., and a jury, when the objection was taken that even if the plaintiff proved all the averments in the claim he could recover only nominal damages, and that the defendant had paid one shilling into court. It was thought better to determine this point first, and the jury were discharged, and the case was reserved for further consideration. The action was heard upon further consideration by Huddleston, B., and his Lordship, after argument, in which *Porter* v. *Vorley* (1) was cited, delivered the following judgment:—

HUDDLESTON, B. The contract was that the defendant should pay, not Allin & Smith, but their creditors. No doubt the right to sue primâ facie passed to the trustee, but he must shew damage of such a character as will enable him to recover a substantial amount. There is no authority to shew that the fact of driving Allin & Smith into liquidation is a ground for damages; and there is nothing to shew that their estate in liquidation is diminished.

(1) 9 Bing. 93.

In substance the only creditors are those whom the defendant has not paid. I think that the plaintiff is only entitled to nominal damages, and that the one shilling paid into court is sufficient. The judgment must be for the defendant.

The plaintiff appealed.

De Gex, Q.C. (*Holmes Poulter*, with him), for the plaintiff. When Messrs. Allin & Smith became insolvent, all rights of action vested in them passed to the plaintiff as their trustee, who is entitled to say that, if he recovers as damages the sum which the defendant ought to have paid to the creditors, he will be able to pay a dividend to the creditors in the liquidation. The trustee alone can sue upon the agreement, the creditors, for whose benefit it was entered into, cannot. If the contention for the defendant is correct, the estate of Messrs. Allin & Smith upon their liquidation was presented to the defendant, who thereby became absolved from all liability to further payment. *Carr* v. *Roberts* (1) is a strong authority in the plaintiff's favour. For the defendant reliance was placed upon *Porter* v. *Vorley* (2), and upon the authority of that case Huddleston, B., decided in his favour; but that decision does not appear to have been approved of in *Hill* v. *Smith*. (3)

Lush-Wilson, for the defendant, was called upon to argue. The estate of Messrs. Allin & Smith has not been diminished by reason of the defendant's breach of contract, for he himself was to pay the creditors. If the defendant had literally fulfilled his contract, the assets passing into the plaintiff's hands would not have been increased. In *Carr* v. *Roberts* (1) the plaintiff sued as an administratrix, and the rights of an administrator are larger than those of a trustee in insolvency. The only damage that could arise from the defendant's breach is, that the liabilities of the estate, which has become vested in the plaintiff, are not diminished; and this is insufficient to support a claim for substantial damages.

De Gex, Q.C., did not reply.

BRAMWELL, L.J. I think that this judgment must be reversed.

(1) 5 B. & Ad. 78. (2) 9 Bing. 93.
(3) 12 M. & W. 618.

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With all respect to my Brother Huddleston, I really cannot agree with him. The defendant undertook to the liquidating debtors to pay for them certain debts. It is alleged that he has not done so, and has refused to do so. If this allegation is correct, the contract has been broken. It is not a contract that can be performed at any time. If it is not performed within a reasonable time it is broken, and broken for ever. The defendant cannot now perform it; all that he could do now would be to mitigate damages by making the payment he agreed to make. If the liquidating debtors had not become insolvent, they clearly would have been entitled to recover by way of damages the sum which the defendant ought to have paid, but did not pay. That being the position of the parties, how can it be possible that the trustee in liquidation is not entitled to recover the sum which the defendant omitted to pay? The plaintiff, who is the trustee in liquidation, must have a right to the same amount as the liquidating debtors would have been entitled to, if they had continued solvent and had brought an action for breach of contract.

It is unnecessary to treat of the authorities at length; but I may say that *Carr* v. *Roberts* (1), cited on behalf of the plaintiff, is in point. That was an action upon a covenant to indemnify. Here the agreement is not merely to indemnify the liquidating debtors but to pay the debts due by them. The distinction however, is immaterial. At first sight *Porter* v. *Vorley* (2) appears to support the contention for the defendant; but it is clear to me that the Court of Exchequer, in *Hill* v. *Smith* (3), did not approve of it; and, moreover, the facts in it were very different from those before us. There a phaeton had been injured by the defendant's negligence, and the true owner might at any time have demanded that the defendant should pay for the repair of the damage, not on account of any contract existing between them, but on account of the injury which the true owner had sustained. The damage to the phaeton might have been treated as a tort. I must confess, however, that I feel a very great distrust as to the propriety of that decision, because if the person from whom the defendant had hired it had remained solvent, he would have been entitled to

(1) 5 B. & Ad. 78.

(2) 9 Bing. 93.

(3) 12 M. & W. 618, p. 631.

recover full damages. Upon the other hand, *Carr* v. *Roberts* (1) seems to me rightly decided.

Upon these grounds I am of opinion that the judgment appealed against must be reversed.

BAGGALLAY, L.J. As the other members of the Court entertain a clear view as to what should be done in this case, any doubt which I may entertain is immaterial. I do feel a doubt as to what should be the ultimate result of this litigation; though I am not satisfied that the grounds of the decision of Huddleston, B., upon the materials before him, were wrong. As the question has been brought before us, it has been in effect an appeal from a judgment upon a demurrer to a statement of some only of the material facts; the whole case will, however, be raised in a more convenient form after all the questions raised by the pleadings have been tried. I therefore think it better to adopt the view of my colleagues, and to hold that the appeal should be allowed.

BRETT, L.J. This action is brought by a trustee for the breach of a contract made with liquidating debtors, and the case has now to be considered as if the only defences had been a traverse of the agreement and of the breach, and as if at the trial it had been found that the agreement had been entered into and that the breach had been committed: the question would then arise as to the amount of the damages: are they only nominal or substantial? Now the contract relied upon is a contract entered into by the defendant with the liquidating debtors for the purchase of their business upon certain terms. Suppose that one of those terms had been that the defendant should pay to the liquidating debtors the sum of 1750*l.*: it is clear that upon their insolvency the plaintiff, as trustee, suing for the breach of the contract would be entitled to recover the sum of 1750*l.*: but the contract was not in that form, the purchase-money was not to be paid in that way, it was not to be paid to the liquidating debtors directly, but to be devoted to the satisfaction of debts owing by the insolvents to other creditors. It is obvious that there was no contract between the defendant and those creditors; the only contract was between the defendant

(1) 5 B. & Ad. 78.

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and the liquidating debtors. If there had been no insolvency, the defendant would have committed a breach of contract by not paying off those creditors. What would have been the damages recovered? They would have been the sum of 1750*l.*, the amount of the unpaid debts. The liquidating debtors would have recovered that sum, because it was part of the contract between them and the defendant, that he should distribute that sum amongst the creditors. If that be so, I can see no principle upon which the trustee may not sue for the breach of that contract, and may not recover the same damages as the insolvents could have recovered: in my opinion it is a general principle that where an action is brought for the breach of a contract, the trustee in bankruptcy or liquidation is entitled to recover the same amount of damages for the breach of the contract, as the bankrupt or insolvent himself would have recovered. It seems to me that *Carr* v. *Roberts* (1) shews distinctly that this proposition is true. It is said that *Porter* v. *Vorley* (2) is an authority to the contrary: I do not think it necessary to determine what principle was decided there. In *Hill* v. *Smith* (3) the Court of Exchequer treated *Porter* v. *Vorley* (2) in the manner in which judges often treat the decision of a Court of co-ordinate jurisdiction which they do not like: the judgment was delivered by Parke, B., and his Lordship said (p. 631): "The circumstances of it were very peculiar," that was as much as to say: "If ever I find a case of exactly the same circumstances, I will take notice of the decision; but if I do not, I will not." In my opinion *Porter* v. *Vorley* (2) was wrongly decided.

BRAMWELL, L.J. The effect of our decision is that the case will go back to Huddleston, B., who will try the other questions raised in the action: the costs of the first trial to be costs in the cause, the costs of the appeal to be the plaintiff's costs.

Judgment reversed.

Solicitor for plaintiff: *George H. Finch.*
Solicitor for defendant: *Walter Justice.*

(1) 5 B. & Ad. 78. (2) 9 Bing. 93.
(3) 12 M. & W. 618.

[IN THE COURT OF APPEAL.]

1880
June 17.

FLETCHER *v.* HUDSON.

Local Board—Acting as Member after Disqualification—Action for Penalty—Party aggrieved—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 253, *sch.* 2, *rule* 70.

By the Public Health Act, 1875, s. 253, proceedings for the recovery of a penalty under that Act shall not, "except as in this Act is expressly provided," be taken by any person other than a party aggrieved, or a local authority, without the consent of the Attorney General; and by Rule 70 of Schedule II. (which by s. 317 is to be read as part of the Act) a penalty is imposed upon any person acting as a member of a local board without qualification, such penalty being by the same rule made recoverable by any person:—

Held, affirming the judgment of the Exchequer Division, that the provision of rule 70 that the penalty might be recovered by any person was an "express provision" of the Act, within the meaning of s. 253, and that consequently in actions for penalties under that rule the consent of the Attorney General was not necessary.

APPEAL from an order at chambers.

The plaintiff in his statement of claim alleged that he was the rector of Grasmere, and a ratepayer of the district of the Grasmere Local Board, and interested in the rates raised in the district and the contracts entered into by the local board, and was aggrieved by the defendant acting as a member of the local board while under disqualification, and he sued for a penalty of 50*l*.

The Public Health Act, 1875, s. 253, enacts that "proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved or by the local authority . . . . without the consent in writing of the Attorney General." The application was made at chambers to stay proceedings on the ground that the consent of the Attorney General was necessary and had not been obtained. Bowen, J., made the order to stay.

May 25. *Cock*, for the plaintiff, moved to set it aside. The plaintiff brings the action under Sched. II. Rule 70 of the Act. That rule enacts that "any person who not being duly qualified as a member of the local board . . . . or being disqualified from acting by any provision of the Act, acts as such member shall be liable to

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a penalty of 50*l.*, which may be recovered by any person, with full costs of suit by action of debt." This is perfectly general and being an express provision (since by s. 317 the schedule is to be read as part of the Act) is exempted in express terms from the operation of s. 253, and no consent is necessary although the person bringing the action is not a party aggrieved. [He referred to *Rochfort* v. *Atherley*. (1)]

Crompton, for the defendant. This is a penalty recoverable under the Act and s. 253 must apply to it. The words of that section are perfectly general, and reading the Act and this schedule together will govern and limit the expression "any person" used in the rule.

HUDDLESTON, B. I am of opinion that this appeal must be allowed and the order made at chambers set aside. It was contended on the part of the plaintiff that the proceedings are taken under Sched. II. Rule 70, and that the plaintiff was a person entitled to bring an action though no consent of the Attorney General had been obtained as required by s. 253. I think this is the correct construction. The rules are to be read as part of the Act, and rule 70 comes within the exception in s. 253, since by the rule it is "expressly provided" that any person may sue. The terms of s. 253 therefore do not apply to an action brought under rule 70, and the consent of the Attorney General is not necessary.

STEPHEN, J., concurred.

The defendant appealed.

June 16, 17. *W. G. Harrison, Q.C.*, and *Crompton*, for the defendant. The plaintiff here is not a party aggrieved. He merely alleges that he is a ratepayer; but that is not enough; one ratepayer is not more aggrieved than another, and surely all the ratepayers in the district could not bring actions simultaneously. The same objection which applies to an action being brought for nuisance to a highway by a member of the public who has suffered no special damage, applies with equal force here. On this point the case of

(1) 1 Ex. D. 511.

Boyce v. *Higgins* (1) is an express decision in the defendant's favour. As also is that of *Hollis* v. *Marshall*. (2) But if he is not a party aggrieved, then the consent of the Attorney General is a condition precedent to his right to sue. It was so held by Lord Coleridge, C.J., and Pollock, B., in *Smith* v. *Fieldhouse*. (3) The attention of the Court below was not directed to that case. Sect. 253 requires consent except where there is an express provision to the contrary, but rule 70 is not an express provision to the contrary; the words, "by any person," mean nothing at all, they might just as well have been left out. The very same words were used in the corresponding section of the Public Health Act of 1848, but in the cases of *Hollis* v. *Marshall* (2) and *Boyce* v. *Higgins* (1), above referred to, which were decided under that Act, it was held that notwithstanding those words the consent of the Attorney General was necessary. The policy of the legislation was repressive of common informers; and there is an especial reason for requiring consent of the Attorney General in this case, for here the penalty is recoverable by action of debt, and the judge at the trial would have no power to reduce the amount. In the case of penalties which are recoverable summarily, the justices need not inflict the full amount; but if in such case consent is necessary, as admittedly it is, à fortiori is it necessary here.

Charles, Q.C. (*Cock*, with him), for the plaintiff. First, the plaintiff is a party aggrieved. Any one of such a limited class as that of ratepayers is a party aggrieved, if by reason of the act complained of he has to pay more rates, or even if there is merely a chance of his having to pay more rates. This is not like the case of a member of the general public suing for an injury to the highway, the class to which the complainant here belongs is a limited one. The cases, it is true, of *Boyce* v. *Higgins* (1) and *Hollis* v. *Marshall* (2) are against the plaintiff's contention, but those cases are not binding on this Court, and the Court is asked to overrule them. Secondly, even if the plaintiff is not a party aggrieved, the consent of the Attorney General is unnecessary. The words, "by any person," in rule 70 are an express provision to that effect. No doubt it was held otherwise in the cases of

(1) 14 C. B. 1. (2) 2 H. & N. 755.
(3) 35 L. T. (N.S.) 602.

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Hollis v. *Marshall* (1) and *Boyce* v. *Higgins* (2); but in the Act of 1848, under which they were decided, there were no words of exception in the section requiring the Attorney General's consent. The words, "except as is in this Act expressly provided," are to be found for the first time in the Act of 1875, and were there introduced for the very object of meeting those decisions. The only authority against the plaintiff's contention is *Smith* v. *Fieldhouse*. (3) But that was only a motion for a rule nisi, and probably was not fully argued. Moreover the case is not reported in any other reports. If necessary, the Court will overrule it. Thirdly, the penalty here sued for is not a penalty within the meaning of s. 253. That section must be read in connection with the rest of the group of sections in which it is found, and its operation was intended to be confined to penalties recoverable by summary proceedings; whereas the present penalty is recoverable by action of debt.

Crompton, in reply. The words, "except as is in this Act expressly provided," were inserted ex abundanti cautelâ—they were not intended to meet any particular case.

BRAMWELL, L.J., I think the judgment must be affirmed, though I confess I say so with the greatest hesitation and doubt.

I think the words, "except as in this Act expressly provided," must mean "except where there is an express provision that some person may sue who is neither a party aggrieved, nor a local authority, nor a person acting with the consent in writing of the Attorney General." In other words, sect. 253 may be read thus: proceedings may be taken by a party aggrieved, they may be taken by a local authority, they may be taken by a person who has the consent of the Attorney General, and lastly they may be taken by any person who, not being one of the preceding, is expressly authorized to do so. Now, I find in the Act three cases (there may be more) in which such persons are expressly so authorized, namely, ss. 192 and 193, and rule 70; in each of them it is provided that the penalty may be recovered by any person. By s. 192 a person holding simultaneously the offices of treasurer

(1) 2 H. & N. 755. (2) 14 C. B. 1.
(3) 35 L. J. (N.S.) 602.

and clerk is rendered liable to a penalty of 100*l.* recoverable by any person by action of debt. By s. 193 the penalty imposed upon an officer or servant of the local authority for being interested in any contract with the authority is made recoverable by any person by action of debt. And again by rule 70 of Schedule II., under which the present action is brought, the penalty is also recoverable by any person by action of debt. The other sections of the Act which impose penalties either give the penalty to the party aggrieved or do not say who is to recover them. In such cases the consent of the Attorney General would be necessary. But in the three cases to which I have referred it is expressly said that any person may sue, and there I think consent would not be necessary. If this was not the intention, the words "by any person" would be unmeaning, and might just as well have been left out. It is, moreover, to be observed that there is this difference between the penalties imposed by ss. 192, 193, and rule 70, and those imposed by other sections, that the former are for offences committed by the members of the local board or their servants, while the latter are not. And possibly the legislature may have thought that, considering the large powers which the board and their servants have, and their opportunities for abusing those powers, and considering the necessity which there consequently is for keeping such board and servants in order, it is unadvisable to impose any such check upon the recovery of penalties against them as that of requiring the previous sanction of the Attorney General to the action being brought. Whether that was their reason or no, I cannot say. Or perhaps the object of the Act may have been this—(I take it for granted that the local authority may sue in all cases in which the offences are committed by persons other than themselves)—the legislature may have meant that where the local authority can sue and do not, it is a suspicious case if a common informer comes forward; but that does not apply where the local authority are themselves the offenders.

As to authorities, we have opinions of judges both ways; on the one hand Lord Coleridge and Pollock, B., in *Smith* v. *Fieldhouse* (1), and Bowen, J., in the present case, thought that consent

(1) 35 L. T. (N.S.) 602.

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was necessary; on the other, Huddleston, B., and Stephen, J., in the Court below, thought that it was not. Having to choose between them, I prefer the opinion of the Court below.

I confess, however, that I have extreme doubt whether the words, "except as is in this Act expressly provided," have not crept into the Act by accident, without any intention to dispense with consent of the Attorney General, whether, that is to say, they were not put in merely ex majore cautelâ.

BAGGALLAY, L.J. I agree that the judgment of the Court below must be affirmed. In this Act there are a large number of sections creating offences and imposing penalties for their commission; and these offences the Act seems to divide into two classes: first, those which may be committed by persons other than the members or servants of the local board; and, secondly, those which may be committed by the members or servants of the local board themselves. In the case of offences of the first class, there are only three kinds of persons who may recover the penalties, viz., a party aggrieved, a local authority, or a person with the consent in writing of the Attorney-General; and then only by summary proceedings under the Summary Jurisdiction Acts; in the case of offences of the second class any person may recover them, and by action of debt. The Act seems to draw a distinction between these two classes of offences, both as regards the persons to recover and also the mode of proceeding for the recovery. And I think the legislature had this distinction in their minds when they introduced into s. 253 the words "except as is in this Act expressly provided." I think that ss. 192 and 193 and rule 70, which deal with offences committed by members or servants of the local board, contain express provisions that in the cases there dealt with any person may sue without the consent of the Attorney General, and that it is to those provisions that the words of exception in s. 253 were intended to refer. I confess that it appears to me to be very reasonable that, considering the large powers that the board have of dealing with the rates, there should be wider means of punishing offences committed by them than of punishing those committed by other people.

BRETT, L.J. I am sorry to say that I cannot dissent. I hope the House of Lords may be more bold. I cannot read this section grammatically, I can hardly read it sensibly. I suspect that those who drew the section intended to put a bridle upon common informers; but some one out of great caution has introduced an exception, to which I can give no meaning, unless it is the meaning given by Lord Justice Bramwell. I very much doubt whether that is the meaning which the legislature intended, but we must construe Acts of Parliament according to the well recognised rules of construction.

Order to stay proceedings rescinded.

Solicitors for plaintiff: *Iliffe, Russell, Iliffe & Cardale.*
Solicitors for defendant: *J. & E. Scott.*

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Contract—Representations influencing Conduct—Mutuality—Interest in Lands—Statute of Frauds, s. 4—Executed Consideration.

A representation, which influences the conduct of a person to whom it is made, is not legally enforceable against the person who makes it unless it operates either as a contract or as an estoppel.

The plaintiff, as heir-at-law of an intestate, claimed the title deeds of the intestate's farm, of which the defendant had taken possession on his death. The defendant counter-claimed a declaration that she was entitled to a life estate in the farm, and to retain the title deeds for her life. The jury found that the defendant was induced to serve the intestate as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by his promise to make a will leaving her a life estate in his farm, if, and when, it became his property:—

Held, by Stephen, J., first, that the finding, taken with the facts, amounted to a finding that there was a contract to the above effect between the intestate and the defendant, and that such a contract being based on a good consideration (whether it could or could not have been enforced by the intestate) was binding on him and his estate; and, secondly, that, since the contract had been completely performed on the defendant's part, s. 4 of the Statute of Frauds did not apply; and that the defendant was entitled to the declaration asked in the counter-claim.

THE facts proved at the trial before Stephen, J., and the arguments employed on the further consideration appear from the written judgment of the learned judge.

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May 18, 1880. *Bagshawe, Q.C., Gainsford Bruce,* and *Ridley,* for the plaintiff.

H. F. Bristowe, Q.C., Waddy, Q.C., and *J. Edge,* for the defendant.

June 2. STEPHEN, J. This case was tried before me at the Durham Summer Assizes in 1879, and was reserved by me for further consideration.

The statement of claim alleged that the plaintiff was brother and heir-at-law of Thomas Alderson, deceased, who died intestate on the 15th of December, 1877, and in whose service the defendant, Elizabeth Maddison, had lived as housekeeper for many years before his death. Thomas Alderson, at the time of his death, was owner in fee of an estate called Manor House Farm, and on his death his property descended to the plaintiff as his heir-at-law. The defendant took possession on Thomas Alderson's death of the title deeds of the property. The plaintiff claimed the restitution of the title deeds and damages for their detention.

The statement of defence admitted in substance the allegations of the statement of claim, but stated in some detail that Thomas Alderson becoming indebted to the defendant for wages, and wishing her to remain in his service, made an agreement with her to the effect that if she would forbear to press him for the arrears of wages due to her, and would serve him for the rest of his life without wages, he would at his death leave her a life interest in the Manor House Farm. Paragraph 7 of the statement of defence stated that Thomas Alderson, meaning to carry out his promises, made a will by which he left the property in question (subject to a small annuity) to the defendant for her life.

By way of counter-claim the defendant repeated the statements above mentioned, and added that the will referred to, though signed by Thomas Alderson, was not properly attested, whereby he had failed to fulfil his engagements to her. She claimed a declaration that she was entitled to a life estate in the Manor House Farm, or to such life estate as the draft will purported to devise to her, and that she was entitled to retain the deeds for her life. In the alternative she claimed to be entitled to retain the deeds till she had been paid all wages due to her, or fair remuneration for her services.

The counter-claim originally contained an alternative claim to have the real and personal estate of Thomas Alderson administered, and that she might be declared to be a simple contract creditor for the amount of her wages at a fair payment for her services; but in the amended statement of defence this was struck out, so that the only questions before the Court are whether the defendant is entitled to a life estate in the property, and whether she is entitled to a lien on the deeds.

At the trial it was proved that Thomas Alderson had made the will referred to, and that it had not been properly attested, so that as a will it was void.

[After stating the evidence at length the judgment proceeded:—]

I asked the jury at the suggestion of the learned counsel on both sides this question:—

Whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise made by him to her to make a will leaving her a life estate in Manor House Farm if and when it became his property? The jury replied, Yes. I reserved for further consideration the effect of this finding and evidence, and the case was argued before me on the 18th of May.

The substantial question in the case appears to me to arise upon the defendant's counter-claim. Has she a right to the declaration for which she asks that she is entitled to a life estate in possession in the property, and to the custody of the deeds for life? If not, I do not see how she can be entitled to a lien upon the deeds for any amount of wages which may be due to her. Indeed it was hardly contended in argument that she was so entitled.

The defendant's case is put in two ways. First, it is said that Thomas Alderson made representations to her which influenced her conduct, and which his heir is bound to make good. Next, it is said that what took place between them amounted to a contract, that in consideration of her serving him for his life he would leave her by will a life interest in the farm, if it became his property during his life and if she survived him. I think that if this was so she is entitled to what is equivalent to specific performance of the contract.

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The law upon the subject is, I think, clear and consistent when all the decisions are considered, but I am led to believe that an impression exists that there may be such a thing as a representation which, though neither a contract nor part of a contract, may have the effect of binding the person who makes it as if it were a contract. I do not agree with this view, and I think it desirable to state fully the way in which the matter presents itself to me. It seems to me that every representation, false when made or falsified by the event, must operate in one of three ways if it is to produce any legal consequences. First, it may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable, or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. Secondly, it may operate as an estoppel preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it. Thirdly, it may amount to a criminal offence. The common case of a warranty is an instance of a representation forming part of a contract. *Pickard* v. *Sears* (1) and many other well-known cases are instances of representations amounting to an estoppel. A false pretence by which money is obtained is an instance of a representation amounting to a crime.

Besides these there is a class of false representations which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it.

It will, I think, be found that all the difficulties of the subject may be solved by keeping in mind this classification of the different classes of false representations. Nothing need be said

(1) 6 A. & E. 469.

here of criminal false representations, nor need I on the present occasion say more of false representations amounting to estoppels than that it does not appear to me that the law upon that subject has anything to do with this case. Thomas Alderson neither did nor said anything that could estop either him or his heir from denying any state of facts whatever. He promised to leave his housekeeper a life estate in the Manor Farm. He intended to do so, and had a will prepared which purported to do so. He signed that will in the presence of two witnesses, but unfortunately they were not both present at once, and accordingly the will was void. What relation can estoppels by consent or by statements have to such a case as this? To say that Alderson's heir-at-law is estopped by Alderson's conduct from denying the validity of the irregularly attested will would be to repeal the Statute of Wills, but I do not see what other estoppel would affect the case. Who is to be estopped? What assertion is he estopped from?

The question, therefore, comes to be this: were the representations made to the defendant terms in a contract, or were they merely voluntary revocable promises which were not in fact carried out? In other words, did Thomas Alderson contract with his housekeeper that he would leave her a life interest in the Manor Farm if she would serve him for his life, and if the farm became his property, and if she survived him; or did he induce her so to serve him by making promises not intended to be legally binding? Did she make a bargain, or did she take her chance of his keeping his word?

Before examining the facts of this particular case it will, I think, be well to refer to the decisions which have led me to state the question in this form. I do so because some of the language used in them may seem to countenance the notion that there may be a binding representation which is neither a contract nor an estoppel. I think, however, that when the matter is considered it will be found that, whenever representations have been held to be binding, the circumstances were such as to shew that all the conditions of a valid contract had been fulfilled, and that in all the cases in which representations have been held not to be binding one or more of those conditions were absent.

I understand by a contract an agreement which the law will

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enforce, and I apprehend that, speaking generally, the law will enforce all agreements made upon good consideration or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal. It may seem trivial to mention such obvious matters, but attention to them appears to me to clear up many decisions which are not otherwise very readily explained.

I now proceed to examine the cases referred to, taking first those in which representations were held to be binding, and next those in which they were held not to be binding.

The first case is *Hammersley* v. *De Biel*. (1) The facts were that the brothers, of a lady engaged to be married, wrote by her father's authority a memorandum, part of which was as follows: "Mr. Thomson proposes for the present to allow his daughter 200*l*. per annum for her private use, subject to a possibility of a reduction in that sum in case political or other circumstances should diminish his income: and also intends to leave a further sum of 10,000*l*. in his will to Miss Thomson to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangements proposed, subject of course, to revision; but they will be sufficient for Baron de Biel to act upon." The paper also contained a condition that Baron de Biel was to settle 500*l*. a year on his wife for life. The marriage took place. Baron de Biel made the settlement which he had engaged to make, but the sum referred to was not left in the will, and it was held that it must be settled for the benefit of a child of the daughter.

Lord Cottenham, in delivering judgment as Lord Chancellor on appeal from the Master of the Rolls, said: (2) "I propose first, to consider whether there was any such agreement previous to the marriage as . . . was binding on the late Mr. Thomson to give an additional 10,000*l*. as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum or in the other evidence in the cause, proof of any such

(1) 12 Cl. & F. 45. (2) 12 Cl. & F. 61, n.

contract, and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to, it will be found that no such formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation."

This language was adopted by Lord Campbell, in delivering judgment in the House of Lords, and by Stuart, V.C., in the case of *Loffus* v. *Maw*. (1) I am inclined to think that it has been misunderstood, and has been supposed to lay down the rule that, in cases of this kind, a representation not amounting to a contract may be binding on the person who makes it. I do not understand Lord Cottenham to have said anything of the sort. His words appear to me to mean only that contracts of this nature may be made like other contracts by informal documents, or partly by documents and partly by conduct. That this is so is clear from other cases. In *Luders* v. *Anstey* (2) it was held that a letter, making a suggestion as to a settlement, followed by marriage under such circumstances as to imply the acceptance of the suggestion, may be a contract for a settlement. *Hammersley* v. *De Biel* (3) has been followed by several other cases. *Prole* v. *Soady* (4) was in principle similar to *Hammersley* v. *De Biel* (3), and Stuart, V.C., decided it on the authority of that case, of which he said: "There was no more than the expression of an intention to leave this sum" (10,000*l*.) "by a revocable instrument. But inasmuch as the expression of that intention on such an occasion had an influence on the conduct of the contracting parties, and was an inducement to the contract, the House of Lords .... compelled the executors of him who had made the representation to pay the money, and to fulfil that which was expressed as a mere intention. This doctrine, which gives all the force of a binding contract to the mere expression of an intention to do something by an instrument revocable in its nature, is too firmly established to be shaken." This appears to me to be equivalent to saying that the cases establish that an agreement to

(1) 3 Giff. 592; 32 L. J. (Ch.) 49.
(2) 4 Ves. 501.
(3) 12 Cl. & F. 45.
(4) 2 Giff. 1.

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make a will in a particular way may be a binding contract, that it need not be made in any particular form, and that if binding it may be enforced against the representatives of the party making the agreement.

Loffus v. *Maw* (1) is the next case. Its facts are almost precisely the same as those of the case now before me. Gunnell being old and infirm promised Loffus that if she would continue in his service till his death, he would leave her the rents of two houses for her life. He shewed her a codicil to his will which he had made for this purpose; but he afterwards revoked it by a further codicil. It was held by Stuart, V.C., that the trusts in favour of the plaintiff in the codicil which had been revoked should be performed.

The judgment quotes part of the passage already quoted from Lord Cottenham's judgment in *Hammersley* v. *De Biel* (2), and also refers to the well-known case of *Pickard* v. *Sears* (3), as an authority to shew that a man may be bound by a representation made to another person for the purpose of influencing his conduct. For the reasons already given, it seems to me to be simpler and more distinct to say that the case was one of a contract by mutual promises—"If you will serve me I will leave you the rents of two houses." If it is objected that a will is in its nature revocable, the answer is that the cases of *Hammersley* v. *De Biel* (2) and *Prole* v. *Soady* (4) shew that that is no reason why a promise for valuable consideration to make a will should not be a binding contract. This language is I think simpler than that which turns upon representations. If the promise had been, "If you will serve me for a year, I will pay you 20*l.*," the promise to pay the 20*l.* would hardly have been described as a representation which the promisor was bound to make good. I do not know why such terms should be applied to a promise to make a will.

Loffus v. *Maw* (1) is approved of in *Coles* v. *Pilkington* (5), which, however, relates to a different subject. *Coverdale* v. *Eastwood* (6) is a case similar in principle to *Loffus* v. *Maw*. (1) The father of a woman about to be married wrote letters to the mother

(1) 3 Giff. 592; 32 L. J. (Ch.) 49.
(2) 12 Cl. & F. 45.
(3) 6 A. & E. 469.
(4) 2 Giff. 1.
(5) Law Rep. 19 Eq. 174.
(6) Law Rep. 15 Eq. 121.

of the intended husband, in which he said, "V. being my only child, of course she will come into possession of what belongs to me at my decease." "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property on my daughter absolutely." These and similar expressions, followed by marriage, were held by Bacon, V.C., to constitute a contract. His words are: "That representations of this kind will constitute a contract is shewn beyond the possibility of question by every case which has been referred to, as well by those in which the contract has been enforced, as by those in which the Court has found it impossible to establish the contract." The result of all these cases appears to me to be that a contract to make a particular disposition of property by will is not invalid merely because a will is revocable, that such a contract need not be made in any particular form (though the provisions of the Statute of Frauds may apply to it) and that the validity of such a contract must be tested by the rules which govern the validity of other contracts.

I now pass to the cases in which representations of intention, whether as to wills or other dispositions of property, have been held not to be binding. All of these are cases in which the language used was considered to amount to nothing more than a declaration of what the parties influenced by it knew or ought to have known to be no more than a present revocable intention. Such declarations, no doubt, in many cases raised natural expectations, which induced the parties to whom they were made to take irrevocable steps; but in each case the decision turned on the question whether the declaration made was intended to form part of a contract, or only to announce a present revocable intention, or (which is the same thing) to make a promise for which there was no consideration.

The first of these cases is *Jorden* v. *Money*. (1) This was a case in which the facts were hard to be ascertained, and were open to various constructions, Lord Cranworth and Lord Brougham differing from Lord St. Leonards in their view of them. When Mr. Money was about to be married, a question arose as to his means, and in particular as to 1200*l.* which he owed to Mrs. Jorden, as

(1) 5 H. L. C. 185; 23 L. J. (Ch.) 865.

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joint obligor on a bond, which in Mrs. Jorden's opinion, had been obtained from him unfairly by a brother of hers, whose personal representative she was. She used language on various occasions which, to say the least, expressed a strong intention not to sue upon the bond, which she said she had abandoned, and Mr. Money was induced to marry by what she said. Afterwards a decree was made by the Master of the Rolls and affirmed by the Lords Justices, that Mr. Money should be released from the bond. It was argued that she had made a representation leading Mr. Money to marry, which she was bound to make good. On appeal to the House of Lords, Lord Cranworth and Lord Brougham were both of opinion that her language amounted at most to a promise not to sue on the bond. Such a promise, made in consideration of Mr. Money's marriage, would have been good as a contract, if the Statute of Frauds had been complied with. The Statute of Frauds not having been complied with, the promise was not binding as a contract, and if regarded as a mere representation, it could not even be said to be false, for it truly represented the state of her mind when she made it. Each judgment, in short, appears to me to proceed upon the principle already stated, that a representation must operate either as a contract or as an estoppel.

Lord St. Leonards took a different view both of the facts and of the law of the case, and part of the language used by him may seem at first sight to imply that a representation not amounting to a contract may have the effect of a contract. According to the view which he took of the facts, Mr. Money's father had certain claims against Mrs. Jorden, which he forbore to urge in consideration of her giving up her claim on his son. This, he said (1), their lordships were "not driven to treat as a contract in the proper sense of the word. It is, however, a representation by one party of an intention" [the word 'not' appears to be here omitted] "to do an act which he refrains from doing in consideration of another party giving up a right to something else, and refraining from doing another act; and I will shew your lordships that that is perfectly good in law, and can be enforced without any legal contract at all." He afterwards says, "He (Mr. Money, the father) says, 'I will not enforce the right against you, which I know I have,

(1) 5 H. L. C. 240.

if you will not enforce your right against my son.' That is a representation which your lordships will presently see the effect of in point of law; but it is a representation that does not depend upon contract; it is not buying and selling, but dealing in representation between parties, a part of the res gestæ of the case up to the time of the marriage." This language does not I think mean more than that the agreement in question was not one of those contracts which have well-known legal names and incidents, like the contract of bargain and sale, but, as Lord St. Leonards states the matter, it was an agreement made upon good consideration and enforceable by law. Such an agreement I should regard as a contract—I know indeed of no definition of a contract which would exclude it.

In a later part of his judgment Lord St. Leonards states that he differs from his colleagues as to the sort of representation which may operate as an estoppel. He supposes them to lay down that (1) "it must be a misrepresentation of the facts, and not a declaration of what you intend to do, or intend to omit to do." The principle, he observes, is that a person is not to be induced to act by deception, whence he infers that "it is utterly immaterial whether it is a misrepresentation of fact as it actually existed, or a misrepresentation of an intention to do or to abstain from doing." If this view were adopted in its entirety, every promise on which a person acted, even if there were no consideration, would be binding by way of estoppel, and such a doctrine would alter the present law by giving legal force to that class of representations which at present are only morally binding. The difference between the classes of misrepresentation which do and do not bind seems to me plain. To say, "I have cancelled this bond," when you have not, is to tell an untruth. To say "I intend to cancel this bond," is to make a statement as to a present revocable intention. If a person chooses to act on such a representation, without having it reduced to the form of a binding contract, he knows, or ought to know, that he takes his chance of the promisor changing his mind, and therefore he is in no worse position if the statement is false when it is made, i.e., if that intention is not really entertained, than if it is true when it is made, i.e., if the intention exists and

(1) 5 H. L. C. 248.

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the person making the statement intends to revoke it if he pleases. I have examined this case at length, because I think that the language I have referred to has contributed to the confusion which has been introduced into the subject, but that, when the whole case is fully considered, it is an authority for the view which I have expressed.

There are several other cases which support the same view. In *Maunsell* v. *Hedges* (1) Mr. Eyre, the uncle of Mr. Maunsell, who was engaged to be married, wrote Mr. Maunsell a letter in which he said, "I have made my will and left you my property in the county of Tipperary, which is considerable." He repeated this statement in another letter, and added, "my county of Tipperary estate will come to you at my death unless some unforeseen occurrence should take place." He refused, however, to make any settlement. In a settlement made by Mr. Maunsell it was recited that he had expectations from Mr. Eyre, and he consented to settle any property which he might receive under his will. The property was afterwards devised to others. It was held in this case that as there was no contract by Mr. Eyre to settle the property, the trustees of the will could not be compelled to convey it to Mr. Maunsell. Lord Cranworth, in his judgment, says (2): "Where a man engages to do a particular thing he must do it: that is a contract; but where there are no direct words of contract the question must be what has he done? He has made a contract or he has not. In the former case he must fulfil his contract; in the latter there is nothing that he is bound to fulfil. . . . Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act upon it, equity will bind him by such representation, treating it as a contract." He says elsewhere (3): "There is no middle term, no tertium quid, between a representation so made as to be effective for such a purpose and being effective for it, and a contract: they are identical." He adds in reference to *Hammersley* v. *De Biel* (4), "Though you see the

(1) 4 H. L. C. 1039.
(2) 4 H. L. C. 1055.
(3) 4 H. L. C. 1056.
(4) 12 Cl. & F. 45.

word 'representation' used as it is in the speech of Lord Cottenham, I cannot think that it was meant to bear the construction now attributed to it, and to raise any such distinction as is now relied on. That word is no part of the judgment. I must say that I do not think it is a word very happily employed. The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another." He adds, "The circumstances there" (in *Hammersley* v. *De Biel*) "gave to the words used the character of a contract which equity was bound to enforce." The judgment of Lord St. Leonards is to the same effect. He is reported to have said expressly in the course of the argument (1), that *Hammersley* v. *De Biel* (2) was a case of contract. Both Lord Cranworth and Lord St. Leonards point out that in *Maunsell* v. *Hedges* (3) there was no contract at all, and they decide the case on that basis. The cases of *Caton* v. *Caton* (4) and *Dashwood* v. *Jermyn* (5) are illustrations of the same principle. Each is a case in which a promise to make a will, not amounting to a contract, was held to confer no rights upon the promisee after the death of the promisor.

Such being my view of the law, I now come to the question whether in this case there was a contract between the parties. The answer to that question put to the jury certainly does not in plain and direct words affirm such a contract, and it is no doubt to be regretted that the question was not so framed as to give them an opportunity to do so. This is to be attributed to the view taken by the counsel, who were no doubt guided by the case of *Loffus* v. *Maw* (6), and were desirous of bringing this case within the terms of the principle laid down in that case by Stuart, V.C. In substance, however, I think the finding of the jury, especially when it is taken in connection with the evidence of the defendant, is equivalent to a finding that there was a contract. It must be taken that the defendant was induced by a positive promise or series of promises to forego the wages to which she would

(1) 4 H. L. C. 1051, and see p. 1060.
(2) 12 Cl. & F. 45.
(3) 4 H. L. C. 1039.
(4) Law Rep. 2 H. L. 127.
(5) 12 Ch. D. 776.
(6) 3 Giff. 592; 32 L. J. Ch. 49.

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otherwise have been entitled, and to give up a prospect of being married. It is to me inconceivable that she should have done this had she not understood the promises so made to be legally binding. The making of the will to her satisfaction, and the fact that Alderson shewed it to her to see if she was satisfied, are to my mind the strongest possible evidence that such was the character of the transaction. If it had been intended that she was to be at his mercy, he would not have shewn her the will.

It was urged that there was no mutuality, that she might have left his service at any moment, and that he would have had no remedy, and that as every contract implies mutuality there was thus no contract. Upon full consideration I do not agree with this view. Whether he would have had any remedy against her if she had left his service may be a question, but there are many cases in which the consideration on one side must be wholly executed before any obligation arises on the other, and in which the party who gives the first consideration is never under any obligation to give it. In such cases it is impossible that more than one party to the contract should ever sue upon it. Cases in which a reward is offered for information are an illustration. The person who promises the reward can never sue any one for not giving the information, but when the information has been given the promisee can sue for the reward. The doctrine that the solemnity of sealing dispenses with consideration is connected with such obligations as these. A bond is usually given in respect of an executed consideration, which, if there were no bond, would often impose an obligation on the obligor, though he may never have had any right of action against the obligee.

Upon the whole I am of opinion that there was a contract between Thomas Alderson and the defendant to the effect already stated. As it was a contract relating to land it falls within the 4th section of the Statute of Frauds, but as it was completely performed on the part of the defendant, according to the well-known doctrine of equity the application of the statute is barred.

There will be a declaration as prayed in the counter-claim, but as the case is certainly one of difficulty, and one in which the

heir could hardly be expected to concede at once the claim made by the defendant, I think that the costs ought to come out of the estate.

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Judgment for the defendant.

Solicitors for plaintiff: *Ridsdale, Craddock & Ridsdale, for Watson, Barnard Castle.*

Solicitors for defendant: *Rogerson & Ford, for Proud, Bishop Auckland.*

[IN THE COURT OF APPEAL.]

Aug. 2.

HARNETT *v.* VISE AND WIFE.

Practice—Costs—Discretion of Judge—Trial by Jury—Rules of Court, 1875, *Order LV.—"Good Cause."*

In exercising his discretion to deprive a successful party of his costs under Order LV., the judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the action. He must, however, assume the truth of the facts found by the jury.

THE action in this case was brought by the plaintiff, who was a doctor practising at Barnet, for a libel contained in a letter written by the female defendant. The plaintiff had been the medical adviser of a gentleman named Perkins, who died about two years before the action, at an advanced age. The plaintiff also acted as the adviser of Mrs. Perkins, his widow, in the management of her property and the investment of her money, and received from her certain sums of money in acknowledgment of his services. Mr. and Mrs. Vise, the defendants, were old friends of Mrs. Perkins, and were annoyed at the manner in which her affairs were managed by the plaintiff, and applied to Mr. Durant, a gentleman in the neighbourhood, who wrote to the plaintiff for an explanation, and eventually took the management of Mrs. Perkins' property.

In July, 1879, Mrs. Perkins had to be removed to a lunatic asylum, and the letter which formed the subject of the action was written to her by Mrs. Vise in September when she was convalescent, warning her against having any further communications

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with the plaintiff, and it was shewn to the plaintiff and two other persons.

The defendants denied the innuendoes alleged in the statement of claim, and pleaded that the letter was a privileged communication, and also pleaded a justification.

The action was tried by Huddleston, B., and a special jury at Westminster in June, 1880, when the judge held that the letter was not a privileged communication, and the jury found a verdict for the plaintiff with 10*l.* damages.

After the trial the counsel for the defendants applied to the judge to exercise his power under Order LV. of depriving the plaintiff of his costs, on the ground that he brought the libel upon himself by his incautious conduct. The judge acceded to the application and refused to allow the plaintiff his costs.

On the 25th of June, 1880,

Tindal Atkinson applied to a Divisional Court of the Exchequer Division, consisting of Huddleston, B., and Stephen, J., to rescind the order of Huddleston, B. He referred to *Harris* v. *Petherick* (1), and submitted that there was no good cause within the meaning of the statute.

HUDDLESTON, B. The case was a very remarkable one. The libel was of a very mild character, but the reason I deprived the plaintiff of his costs was this, that I thought that he had brought the whole thing on himself. The old woman was evidently of very weak intellect, and he had got hold of the whole of her property so as to excite very just suspicion on the part of the neighbours. The defendants appealed to a gentleman of very high position in the neighbourhood, Mr. Durant, and then the plaintiff was induced to give up the money which he had got, and this was a kind letter written by the female defendant to the old woman who was coming out of the asylum, in which she told her all the little chit-chat of the neighbourhood, and said in effect, "Now you are getting well, mind you keep away from that doctor; you know what he brought you to before, and withstand the allurements of those people." That was the libel. The

(1) 4 Q. B. D. 611.

jury took a very strong view of the case and gave a verdict, which, to my mind, was inexplicable, a verdict for the plaintiff, 10*l.* damages. I expressly took time to consider the matter, and I consulted my Brother Stephen in the interval, and I came to the conclusion that it was just the case intended by Order LV., in which the Court is to interfere for the purpose of preventing the plaintiff from getting his costs.

STEPHEN, J. It seems to me that the intention of the legislature in passing the statute was to give the judge a discretion as to the costs, and that good cause may perfectly well appear at the trial, consistently with the finding of the verdict, why the judge should think that the plaintiff was disentitled to costs. In this case, having regard to what my Brother Huddleston says is the view he took of the facts, it would be consistent with what he says to admit that the jury were perfectly justified in finding the verdict they did, and in finding that the libel was not itself justifiable, and that the plea of justification was not made out, and yet he may have been of opinion—and it seems from what he has now stated that he is of opinion—that the plaintiff had conducted himself in such a manner that if he had been a person with proper feeling he would not have brought the action, and that he brought the whole thing upon himself. That being my opinion, I think he was quite right in depriving the plaintiff of his costs, and when he consulted me upon the subject I expressed that view to him, and told him that in my opinion he, taking that view of the subject, was right in making the order, and I think so now. The application must be dismissed with costs.

From this decision the plaintiff appealed.

July 30. *Watkin Williams, Q.C.*, and *Tindal Atkinson* for the plaintiff. No "good cause" has been shewn within the meaning of Order LV. Those words apply to the conduct of the successful party in the progress of the litigation itself, which may have caused embarrassment or needless expense to the unsuccessful party, and were not intended to give the judge the power of neutralizing the result of the verdict of the jury. In the present case the action was brought to vindicate the character of the plaintiff, and

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he did not press for vindictive damages; and the effect of the verdict for 10*l.* damages was to establish the fact that the letter was a libel, and to exonerate him from the charges contained in it. The judge has in effect set aside this verdict at his own discretion. It was never intended by the legislature to give this power to the judge: *Harris* v. *Petherick* (1); *Garnett* v. *Bradley* (2); *Myers* v. *Defries* (3); *Collins* v. *Welch* (4); *Field* v. *Great Northern Railway Co.* (5); Judicature Act, 1873, s. 67.

Moulton (*Willis, Q.C.*, with him), for the defendants. The construction put by the plaintiff upon the words "good cause" is too narrow. The judge is not confined to a consideration of the conduct of the successful party merely in the progress of the action. If he thinks, that although the plaintiff was legally entitled to a verdict, he had caused the litigation by his imprudent or vexatious conduct, or that there are any other equitable reasons either before or after the litigation has commenced, he has the discretion to refuse him his costs. The judge does not thereby set aside the verdict. Here the general conduct of the plaintiff throughout those transactions with Mrs. Perkins was sufficient to give rise to suspicions entertained by the defendant, and in effect to invite the letter which was written by her. No doubt the verdict of the jury decided that the letter was a libel, and that it was not altogether justified, but the amount of damages shews that they thought the plaintiff's conduct was not entirely without blame. Under these circumstances the judge rightly exercised his discretion under Order LV. of refusing him his costs.

Tindal Atkinson, in reply.

JAMES, L.J. I am of opinion that the jurisdiction as to costs given to the judge by Order LV. is not confined, as has been argued, to the conduct of the parties in the litigation itself. This was not the intention of the Act in creating this new jurisdiction, which is to be exercised "for good cause shewn;" and it is not at all consistent with the language or spirit of the order to assume, as we are called upon to do by the argument on behalf of the plaintiff, that the clause is to be read, as if there were this understood

(1) 4 Q. B. D. 611.
(2) 3 App. Cas. 944.
(3) 5 Ex. D. 180.
(4) 5 C. P. D. 27.
(5) 3 Ex. D. 261.

condition or proviso: "Provided that in all cases in which in an action for slander or libel a jury shall find a verdict for the plaintiff with damages to the amount of 10*l.*, the judge shall be bound to accept such verdict as conclusively shewing that the plaintiff is entitled to costs." The jury are not judges of the costs of the action; and on the other hand the judge in exercising the jurisdiction given to him by Order LV. must not take upon himself to overrule the verdict of the jury, and has no right to say that the particular thing complained of was not a libel, it being a question of fact for the jury to determine whether there was de facto a libel, and whether there was any justification of that libel. So long as the verdict of the jury remains unchallenged the judge, however he may dissent from the verdict, must not take upon himself to overrule the finding of fact, and say that there was no libel. The verdict therefore is conclusive that there was a libel; and that some part at least of the libel was not justified. But the amount of damages given by the jury is not to be considered as conclusively establishing any remaining matter at issue. Every judge would take it as a material element in considering whether the jurisdiction given by Order LV. is to be exercised or not. But it is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may shew that the action was not properly brought in respect of the libel complained of.

These are the principles on which this case must be decided. Now the letter in respect of which the action was brought was a long, friendly, gossiping letter not giving any new facts, but merely making references to and comments on matters of common knowledge between the writer and the receiver, with advice as to her future conduct. It almost came within the protection afforded to privileged communications. I am satisfied that this letter never did or could have done the slightest harm to the plaintiff; and further, that it was not the true cause of the litigation. This is shewn beyond a doubt by the lawyer's letter which preceded the action, and which did not refer to the letter itself but to rumours in circulation against the

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plaintiff, which could not by possibility be traced to the letter. The contents of the letter could not have been known by any one beyond two or three persons, unless the plaintiff had himself communicated them. The real object of the litigation was that the plaintiff thought he could avail himself of certain incautious expressions used in this letter to put himself right as to disagreeable rumours current about his conduct. In my view of the case, the letter had no effect in keeping these rumours alive, nor in exaggerating them, but the plaintiff seized the opportunity of dragging this lady and her husband into Court and has succeeded to a certain extent in his object. I do not say he was entirely unjustified, but it is clear to me that his conduct was such, whether incautious or otherwise, as to have given rise to the rumours. The judge who tried the action came to the conclusion that there had been a great deal in the conduct of the plaintiff that really caused the whole matter, and in these circumstances thought himself justified in depriving him of his costs. I think he was right in so doing. It was argued that the sum of 10*l.* was conclusive that there had been no misconduct or incautiousness on the part of the plaintiff. I cannot but think that the sum of 10*l.* was not awarded as the measure of any damage due to the letter, or as the measure of injury to the wounded feelings of the plaintiff, but was obtained through the eloquence and skill of his counsel, who managed to impress upon the jury that a less sum would not be sufficient to send the plaintiff home with his character cleared. In fact it was given as a response to the appeal to their feelings, and not as the actual measure of the damage done to the plaintiff by the defendant's letter. I think the judge was justified in holding that the 10*l.* given as damages was not substantially different from 20*s.* It appears to me that it would be doing injustice to the defendants if we were to make them pay costs on account of this incautious letter. The appeal must be dismissed with costs.

BRETT and COTTON, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Digby & Tabor.*
Solicitor for defendants: *T. S. George.*

[IN THE COURT OF APPEAL.]

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May 12.

HILLS *v.* RENNY AND OTHERS.

County Court—Interpleader Summons—County Courts Act, 1867 (30 & 31 *Vict.* c. 142), s. 31—*Officers of the County Court—Stay of Action after Sale of Goods.*

Where goods are seized under an execution issued on a judgment in a County Court and sold, and an interpleader summons is taken out at the instance of the High Bailiff, under the County Courts Act, 1867, s. 31, the County Court judge has power to adjudicate upon the damages, to which the claimant of the goods may be entitled, arising out of the execution, although the goods have been sold, and therefore are no longer in the control of the County Court; and any action against the officers of the Court for wrongfully depriving the plaintiff of his goods will be stayed; but an action against the purchasers of the goods from the officers of the County Court will not be stayed.

THIS was an appeal from a refusal of a master to stay proceedings in the action. The matter came by way of appeal before a judge and was referred to the Court.

The action was brought against six defendants, three of whom were officers of a county court, to recover damages for wrongfully depriving the plaintiff of his goods, which had been seized under an execution on a judgment of the county court against one Hills, a brother of the plaintiff. An application was made at chambers to stay the proceedings against the three county court officers, on the ground that an interpleader summons had been issued, under the County Courts Act, 1867, s. 31.

1879. Dec. 1. *Bigham*, for the applicants, contended that the order should be made. That the Act was intended to protect the officers of the Court, and covered the present case. He cited *Jessop* v. *Crawley* (1), *Tinkler* v. *Hilder* (2), *Winter* v. *Bartholomew*. (3)

Cock, contrà, contended that the plaintiff was not making a "claim to or in respect of any goods or chattels taken in execution under the process of a county court, or in respect of the proceeds or value thereof" within the section, since the goods had been sold before the claim was made, and the jurisdiction

(1) 15 Q. B. 212. (2) 4 Ex. 187.
(3) 11 Ex. 704; 25 L. J. (Ex.) 62.

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of the county court only arose when the goods came into the possession of the officers of the Court, and terminated when they ceased to have control over them. He cited *Abbott* v. *Richards* (1), and *Death* v. *Harrison*. (2)

1880. April 8. The judgment of the Court (Kelly, C.B., and Stephen, J.) was read by

STEPHEN, J. This case was referred by Mr. Justice Stephen, for the opinion of the Divisional Court, having come before him at chambers, on appeal from the decision of a master, who refused to make an order to stay proceedings under the following circumstances.

The action was brought by the plaintiff, John Frank Hills, against Renny, Whiteman, Chalcroft, Kinsole & Son, Lock and Silverton. The claim endorsed on the writ is for wrongfully depriving the plaintiff of goods, and the relief claimed is the return of the goods, and damages for their detention.

Three of the six defendants were officers of the county court at Portsmouth, Renny being the high bailiff, and the other three were purchasers from them. The motion now before us is made on behalf of the county court officers only.

Two persons named May and Cripps, sued Hills the brother of the plaintiff, in the Portsmouth County Court, and recovered judgment against him in each action.

On the 23rd of July, 1879, a warrant for execution was put into the defendant Whiteman's hands, and he levied on the goods in question. On the 29th of July, the goods were sold for 19*l*. 15*s*.

On the 30th of July, the day after the sale, Hills, the plaintiff, sent in a claim to the goods.

On the 12th of August, the writ in this action was issued by Hills the plaintiff.

On the 15th of August an interpleader summons was taken out in the county court under 30 & 31 Vict. c. 142, s. 31, and on the 19th of August a summons to stay proceedings in this action was taken out before a Master of the High Court, who, on the hearing, made no order. His decision was appealed from to Mr. Justice Stephen at chambers, and he referred the matter to the Divisional

(1) 15 M. & W. 194. (2) Law Rep. 6 Ex. 15.

Court. The county court interpleader summons stands over till the decision by this Court of the summons to stay proceedings.

The words of s. 31 of the County Courts Amendment Act of 1867 are, "If any claim shall be made to or in respect of any goods or chattels taken in execution under the process of a county court, or in respect of the proceeds or value thereof, it shall be lawful for the registrar of the court, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the said Court as well the party issuing such process as the party making such claim, and the judge of the Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as to him shall seem fit, and shall also adjudicate between such parties or either of them and the high bailiff, with respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff and make such order in respect thereof and of the costs of the proceedings as to him shall seem fit:" after making provision for the enforcement of the order and providing that it shall be conclusive between all the parties, the section ends by enacting as follows: "And upon the issue of the summons any action which shall have been brought in any court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed." It follows that the proceedings in the present action ought to be stayed, if it is brought in respect of any goods taken in execution under the process of any county court, or in respect of the proceeds or value thereof, or in respect of any damage arising out of the execution of the process of a county court.

It was contended on the part of the plaintiff that the action was not a claim to or in respect of goods taken under the process of a county court, because the goods had been sold before the claim was made, and so had ceased to be taken in execution at the time when the action was brought. It was also said that it was not brought in respect of the proceeds or value of the goods, but for their return and for damages for their detention. An attempt was also made to shew that the claim was not for any damage arising out of the execution of the process of the Court.

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Independently of all authority, it appears to us that the case falls within the words of the section, and also within its obvious intention, which was that the county court judge should decide just such questions as those which arise in this case. Apart, however, from this, we think that the counsel for the plaintiff entirely failed to distinguish this case from the case of *Death* v. *Harrison* (1) and from the earlier case of *Tinkler* v. *Hilder* (2), in which (though it was decided on another ground), the majority of the Court of Exchequer expressed an opinion in favour of the view which we take. There must therefore be an order to stay proceedings as against the county court officers.

Order to stay.

The plaintiff appealed.

When the case came first before the Court of Appeal it was adjourned in order to give the defendants, who had purchased the goods in question from the defendant Renny, an opportunity of appearing.

1880. May 12. *Bigham*, for the county court officers. The action ought to be stayed against all parties; each party is separately liable for the tort, and it is proper that the rights of the parties should be equitably adjusted by the judge of the county court. There cannot be a valid claim against a bailiff in respect of goods which he has sold.

English Harrison, for the purchasers. 30 & 31 Vict. c. 142, s. 31, is a substitute for 9 & 10 Vict. c. 95, s. 118; but the two enactments are not identical: the language is different, and the present enactment is more comprehensive in its terms; it includes claims for damages arising out of the execution of any process. The whole object of the later section is to increase the power of the Court. It is only equitable that the purchasers should have summary relief, for they have no right to an indemnity from the high bailiff.

Cock, for the plaintiff. 30 & 31 Vict. c. 142, s. 31, was intended to meet one of two cases, either when the goods are still

(1) Law Rep. 6 Ex. 15. (2) 4 Ex. 187.

in the custody of the bailiff, or when the claimant seeks to recover the proceeds of the sale; it does not apply to a case where the owner desires to follow the goods. The words "taken in execution" must mean "whilst held in execution."

BRETT, L.J. We were in hopes to be able to give a wide interpretation, so that all the persons interested should go before the judge of the county court, and that their respective rights should be determined by him; but I do not see my way to this conclusion.

It seems to me that the present case falls within 30 & 31 Vict. c. 142, s. 31. "Taken in execution" does not mean "whilst held in execution:" that would be a violent construction: "taken in execution" may be read as "having been taken," or "which have been taken:" this is not an unfrequent idiom. It is provided that, upon the application of the high bailiff, a summons shall be issued to call before the judge the party issuing the process and the claimant. The judge therefore has power to decide between the execution creditor and the claimant and the bailiff; but these are the only parties over whom he has jurisdiction. In the last clause of the section, power is given to stay actions arising in respect of claims to the goods taken in execution. No doubt the words are very large, and it is argued that they embrace the case of actions brought against other parties, and that if an order to stay is made, no action can be maintained against them. I think that this argument leads to a result which cannot be maintained. The power to stay must be confined to those parties, who appear before the judge of the county court. The present action is brought by the claimant against the bailiff and his officers, and also against the purchasers of the goods seized, who are unfortunate if they purchased innocently. As the facts fall within 30 & 31 Vict. c. 142, s. 31, the action ought to be stayed as to the high bailiff and his officers; but there is no authority to stay it as against the purchasers. The judgment of the Exchequer Division was right, and as the action could not have been stayed in favour of the purchasers, it must proceed as against them. I do not express my opinion as to what the result will be. The dispute between the claimant, the high bailiff, and the execution creditor must go

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back to be decided before the judge of the county court. We shall give no costs in this court against the purchasers.

COTTON, L.J. The question is whether this action can be stayed. The order to stay purports to be made under 30 & 31 Vict. c. 142, s. 31. The words "taken in execution," cannot be construed as "still held under execution." It is said that the section has no application to the present case, because there is only power to bring before the judge of the county court, at the instance of the bailiff, the claimant and the execution creditor. The first point to be considered is whether the purchasers can be summoned; the statute gives power to summon the party claiming the goods, and the party at whose instance the execution has been issued. These words do not primâ facie include a purchaser of the goods; but it is argued that he is a person making a claim to them; but I think that the word "claim" refers to a claim adverse to the execution, not to a claim under it. There is therefore no power to bring before the county court any purchaser from the high bailiff; there is no power to give any damages against him, which might be a substitute for a right of action at common law. As there is no power to bring a purchaser before the Court, there is no power to stay proceedings against him. I think that the last clause of the section does not extend to purchasers.

THESIGER, L.J. The enactment, which we have to construe, is not clear and is not satisfactory: it is unfortunate that the rights of all parties cannot be adjusted in one proceeding. It seems to me that the Exchequer Division was right. The counsel for the plaintiff has contended that 30 & 31 Vict. c. 142, s. 31 does not apply, because damages for the wrongful seizure of goods are claimed and are in truth the gist of the action: this contention, however, cannot be supported, for the section extends to "claims in respect of any goods;" the plaintiff is the claimant of either the true value of the goods or the sum which they actually fetched. There is therefore jurisdiction to summon the execution creditor and the claimant before the judge of the county court but no jurisdiction to summon a purchaser of the goods.

The remaining question is whether, as there is no jurisdiction to summon the purchasers before the county court judge, the

action can be stayed as to them. I think not. The words of the last clause are not clear; but the reasonable interpretation is that they must be limited by what has gone before. Any action against any of the parties, who may be brought before the judge of the county court, is to be stayed: but the position of a purchaser from the high bailiff must be determined in the action in which he is sued.

Appeal dismissed.

Solicitors for plaintiff: *Pattison, Wigg, & Co.*

Solicitors for county court officers: *Gregory, Rowcliffes, & Rawle.*

Solicitors for purchasers: *Sole, Turner, & Knight, for G. H. King, Portsea.*

[IN THE COURT OF APPEAL.]

Aug. 5.

THE METROPOLITAN BANK *v.* HEIRON.

Statute of Limitations—Breach of Duty by Person in a Fiduciary Position—Bribe to Director—Concealed Fraud.

An action was brought by a company in 1879 against a former director to recover 250*l.*, on the ground that the defendant had received it from a debtor to the company as a bribe, to induce him to use his influence to obtain favourable terms of compromise for the debtor. The allegations that this bribe had been given had in 1872 been brought before the directors at a board meeting, they had investigated it, and as it seemed came to the conclusion that the charge was unfounded, as no proceedings were taken, and it was not alleged that the other directors had been acting otherwise than bonâ fide in the matter.

Held, affirming the decision of Stephen, J., that the claim of the company was barred by the Statute of Limitations.

Although where a trustee receives money upon an express trust and wastes it, the Statute of Limitations does not run against the claim of the cestui que trust, yet where a trustee receives money not belonging to the cestui que trust, but which the cestui que trust can claim on the ground that the receipt of it was a fraud upon him, the Statute of Limitations will run against the claim of the cestui que trust from the time when he discovers the fraud.

THIS was an appeal from a decision of Stephen, J.

The action was by The Metropolitan Bank, which was in course of voluntary liquidation, and the liquidator, against Heiron who had been a director.

The 4th paragraph of the statement of claim alleged that in

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1872 the defendant by false and fraudulent statements as to the pecuniary position of one F. Daniells, induced the bank to accept from Daniells the sum of 50*l.* in satisfaction of a claim which they had against Daniells for 3800*l.* The 5th paragraph was as follows:—

"While the said F. Daniells was still liable to the bank in the sum of 3800*l.*, the defendant was a director of the said bank and attended meetings of the directors, and as such took an active part in the management and conduct of the business of the bank, and performed the various duties, and acted otherwise in the capacity, of a director, and stood in a fiduciary relation towards the bank. The said F. Daniells having represented to the bank that he was unable to pay to the bank the whole of the sum of 3800*l.*, requested the defendant to endeavour to procure a settlement of the said claim of the bank and to use his influence and position as a director for that purpose, which the defendant agreed to do, and while the defendant was acting as a director as aforesaid, handed to the defendant, and the defendant received from him, the sum of 250*l.*, for the purpose of so settling the said claim. The defendant did not pay or hand over to the bank the said sum of 250*l.* nor any part thereof, but wrongfully, and in breach of his trust and fiduciary relation to the bank, retained the said sum for his own use, and by misrepresentations to the bank induced the bank to agree to accept, and the bank did accept, the sum of 50*l.* from the said F. Daniells in discharge of the said claim of the bank against him."

The plaintiffs claimed from the defendant (inter alia) "the sum of 250*l.* in respect of the matters in the 5th paragraph mentioned."

The defendant by his defence denied having received anything from Daniells. In paragraph 7 he pleaded the Statute of Limitations to all the demands of the bank, and as to the claim for 250*l.* he, by paragraph 8, alleged that assuming the bank ever to have had a claim against the defendant in respect of it, they had disentitled themselves to recover it by slackness and delay, and by omitting to take proceedings for a long time after the alleged facts on which their claim was founded came to their knowledge, or for a long time after they might by due diligence have discovered the facts.

The plaintiffs by their reply alleged as to paragraph 7 of the defence, that the causes of action mentioned in the 5th paragraph of the statement of claim arose wholly in respect of a breach of trust and breach of duty by the defendant in his fiduciary relation to the bank.

The resolution to release Daniells on payment of 50*l.* was passed by the directors on the 26th of March, 1872. On that same day the solicitors of Daniells wrote to Heiron a letter which was in fact as follows:—

"We have been consulted by Mr. F. Daniells with reference to the circumstances under which you obtained from him the sum of 100*l.* cash and bills of exchange for 150*l.* in addition, under the pretence that you as a director of the Metropolitan Bank, Limited, could and would exercise such influence as would induce that bank to discharge him from his liability the payment of which you guaranteed. . . . We require payment of the 100*l.* and the return of the bills during to-morrow, and if this demand be not complied with we shall take further action without any notice to you." This letter was communicated by Heiron to the solicitors of the bank, and was discussed at board meetings of the directors in or about May, 1872, and communications passed between Daniells and the board on the subject. No steps, however, were taken to enforce against Heiron any claim in respect of the matters mentioned in the 3rd and 4th paragraphs of the statement of claim till the commencement of the present action on the 25th of June, 1879. There was no allegation either on the pleadings or in evidence that the directors believed the allegations made by Daniells to be true and were acting in collusion with Heiron.

Stephen, J., held that the Statute of Limitations was a bar to all the claims of the plaintiffs. The plaintiffs appealed.

Phillimore, for the appellants. This is an equitable action on the ground of breach of trust, and the Statute of Limitations is no bar: *Brittlebank* v. *Goodwin* (1); *Obee* v. *Bishop* (2); *Stone* v. *Stone*. (3)

(1) Law Rep. 5 Eq. 545. (2) 1 D. F. & J. 137.
(3) Law Rep. 5 Ch. 74.

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[COTTON, L.J. In those cases a person had money in his hands upon an express trust. Have you any case as to the applicability of the Statute of Limitations where a director has received money which never was the money of the company, and to which the company has no claim, except on the ground that the director received it as a bribe for committing a breach of trust?]

The principles laid down by Lord Hardwicke in *Charitable Corporation* v. *Sutton* (1) apply to such a case, and there the remedy was given after more than six years.

[COTTON, L.J. In that case the funds of the company were lost by the misconduct of the directors. The question is whether the same rule applies to a sum which has never actually become part of the funds of the company.]

The Court is not bound by the Statute of Limitations in such a case, because the statute only applies to legal demands, and Courts of Equity, as is shewn by the cases referred to, do not follow the analogy of the statute in cases relating to breaches of duty. *Hovenden* v. *Lord Annesley* (2) was relied upon by the defendant in the Court below, but that was a case where the demand was of a legal nature, and was only brought in equity because there was an outstanding legal estate which prevented the action being brought at law, and it is only to such cases that the Statute of Limitations will be applied by analogy. A director is a quasi-trustee: Lindley's Partnership, pp. 597, 613, and the same rule applies to him as to a trustee.

Gore, contrà. This is an action for money had and received, and the money was recoverable at Common Law: *Morison* v. *Thompson* (3), which was a case like this of a bribe.

[BRETT, L.J. That is quite a different case. The substance of it was that the agent bought the ship for one price, told the principal that he had bought it for more, and pocketed the difference. In that case if the agent had been honest he would have paid the money to the principal; in the present case, if he had been honest he would never have received it at all.

JAMES, L.J. In that case the agent divided the purchase-money

(1) 2 Atk. 400. (2) 2 Sch. & Lef. 607, 630.
(3) Law Rep. 9 Q. B. 480.

between the vendor and himself. I cannot see how a bribe paid to an agent can be considered money had and received for the use of the principal.

BRETT, L.J. It appears to me that an action at law might lie in this case for the misrepresentations made by the defendant, if they were fraudulently made, and that the loss which the bank suffered through them would be the measure of damages; but I do not understand how this 250*l.* could be recovered at law on the ground that the defendant received it as a bribe.]

Assuming, then, that there is no demand at law, the equitable remedy on the ground of fraud is barred by the Statute of Limitations, for the statute begins to run from the time when the fraud is discovered: *South Sea Company* v. *Wymondsell.* (1) Here the whole matter was discussed at board meetings of the directors more than six years before this action was commenced. [He was here stopped by the Court.]

Phillimore, in reply.

JAMES, L.J. The ground of this suit is concealed fraud. If a man receives money by way of a bribe for misconduct against a company or cestui que trust, or any person or body towards whom he stands in a fiduciary position, he is liable to have that money taken from him by his principal or cestui que trust. But it must be borne in mind that that liability is a debt only differing from ordinary debts in the fact that it is merely equitable, and in dealing with equitable debts of such a nature Courts of Equity have always followed by analogy the provisions of the Statute of Limitations, in cases in which there is the same reason for making the length of time a bar as in the case of ordinary legal demands. In the case of a bribe received, or other profit made by a person in a fiduciary position, there is no doubt that the cestui que trust who is wronged is not barred by any length of time, so long as that wrong is concealed from him by the wrongdoer. But when the cestui que trust knows of the fact, or knows that the fact is charged, and investigates the case, it is for him to make up his mind whether he will bring proceedings, just as any other creditor has to make up his mind whether he will issue a writ or not, and

(1) 3 P. Wms. 143.

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if he allows six years to elapse after he has had full information and knowledge of the alleged wrong before he takes steps to enforce the redress for that wrong, then the person against whom he brings such a suit has, according to my view, a clear right to avail himself of the lapse of time against the claim as much as if it had been a mere legal demand. I think, therefore, that the Statute of Limitations in this case began to run from the time at which the company discovered the fact, and the company must be held to have discovered the fact at the time when the person who is said to have paid the bribe went to the board of directors and told them the circumstances of the case. The fact that the directors investigated it and came to the conclusion that it was not true, does not at all help the company, unless they allege and prove that the directors became accomplices in the fraud and added to the original fraud by a gross neglect of duty on their part. There is no suggestion of that kind, and if there were it ought to have been proved that they neglected their duty in not communicating the fact to the company of which they were directors.

BRETT, L.J. It seems to me that the only action which could be maintained by the company or by the liquidator of the company against this defendant would be an action in equity founded upon the alleged fraud of the defendant. Neither at law nor in equity could this sum of 250*l.* be treated as the money of the company, until the Court, in an action by the company, had decreed it to belong to them on the ground that it had been received fraudulently as against them by the defendant. In such a case, as I understand the ruling of Lord Redesdale, the money is to be considered as held adversely to the plaintiffs, the company, until the decree; and where the suit is founded upon fraud so that there is no trust until the decree, although the Statute of Limitations does not strictly apply to equitable demands, yet Courts of Equity will follow the analogy of the statute and apply it to such a case.

Then the only remaining question is, from what time does the statute run, and it seems to have been held that it runs from the time when the fraud is first made known to the plaintiff. If in

the present case, notice of the alleged fraud had only been given to the other directors individually, it seems to me that this would not have been notice to the company, and that the statute would not have begun to run; but here the fraud, if fraud in fact there was, was made known to a board of directors acting as such at a properly constituted board meeting, which is the only way in which a company can receive notice. Therefore the fraud, if any, was made known to the company, and was so made known more than six years before the action was instituted. The claim therefore is barred.

COTTON, L.J. In this case Mr. Justice Stephen was, in my opinion, right in holding that the claim was barred by the Statute of Limitations. In favour of the appeal it was urged that no time runs against a breach of trust; but that argument was founded on an insufficient definition of what is meant by a breach of trust. Where a trustee has a fund in his possession and wastes it either by neglect of duty, or by doing an act not justified, and the cestui que trust comes to recover his money, no time will bar his suit, for it is a claim by the cestui que trust against the trustee for money or property which was in the possession of the trustee, and must be considered as in the possession of the trustee for the benefit of the cestui que trust until the trustee duly discharges himself. To such a suit there is no bar by statute.

But the present is not such a case. Here the money sought to be recovered was in no sense the money of the company, unless it was made so by a decree founded on the act by which the trustee got the money into his hands. It is a suit founded on breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud. It is very different from the case of a cestui que trust seeking to recover money which was his own before any act wrongfully done by the trustee. The whole title depends on its being established by a decree of a competent Court that the fraud of the trustee has given the cestui que trust a right to the money, and although no time will run in such a case till the cestui que trust knows of the fraud, yet a Court of Equity, whether by analogy or in obedience to the statute, will hold such a claim

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barred if the cestui que trust stands by and takes no proceedings for six years from the time when he became aware of the fraud.

The only question, therefore, in this case, is whether the company is to be held to have known of the fraud more than six years before the commencement of the action. The mere statement that the alleged fraud was known to the directors left this doubtful, but it appears that it was made known in the only way in which the company can know anything, by a communication made to the directors at a regular board meeting, and there is no suggestion that they, for any purpose of their own or in fraud of the company, abstained from investigating it. They seem to have investigated it and to have been of opinion that the charge was not well founded. They in 1872 knew of the charge and of the circumstances which would have justified the company in bringing the claim. From that time the statute began to run, and in my opinion Mr. Justice Stephen was right in saying that it was a bar to this action.

Appeal dismissed.

Solicitors for plaintiffs: *Newman, Stretton, & Hilliard.*
Solicitors for defendant: *Harper, Broad, & Battcock.*